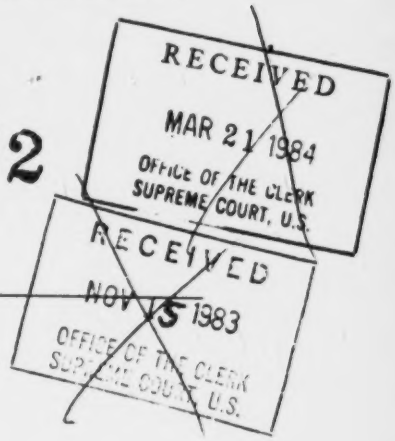
No. 83-

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1983

ORIGINAL 83-6452



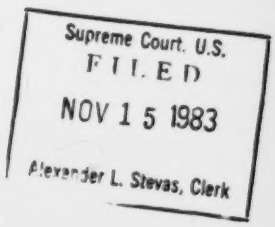
GEORGE DAVID TOKMAN,

Petitioner,

v.

STATE OF MISSISSIPPI,

Respondent.



PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF MISSISSIPPI

JOHN W. KARR
625 Washington Building
Washington, D.C. 20005
(202) 737-3544

Counsel for Petitioner

KARR & LYONS
WASHINGTON, D.C. 20005
(202) 737-3544

QUESTIONS PRESENTED

1. Whether infliction of the death penalty on an adolescent under the age of 18 at the time of the offense constitutes cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments.

2. Whether, in a capital case, the Eighth and Fourteenth Amendments prohibit an instruction to the jury that it may find two aggravating circumstances where the facts permit a finding of only one such circumstance.

3. Whether the Eighth and Fourteenth Amendments were violated when the jury was instructed that petitioner could be sentenced to death upon a finding that the offense was "especially heinous, atrocious or cruel," without any additional guidance provided to the jury as to the meaning of that phrase.

4. Whether the Sixth and Fourteenth Amendments were violated by the exclusion for cause of a juror who indicated that he could impose the death penalty in an appropriate case even though he harbored conscientious scruples against the death penalty in general.

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Petitioner George David Tokman prays that a writ of certiorari issue to review the judgment of the Supreme Court of Mississippi entered in this case.

OPINION BELOW

The opinion of the Supreme Court of Mississippi affirming petitioner's conviction of capital murder and sentence of death by lethal gas is officially reported at 435 So.2d 664 (1983), and is reproduced in the appendix to this petition at pp. A. 1-18.[1/]

JURISDICTION

The judgment of the Supreme Court of Mississippi was entered on June 1, 1983, and a timely petition for rehearing was denied on August 17, 1983. The jurisdiction of this Court rests on 28 U.S.C. Sec. 1257(3), petitioner having asserted below and asserting here deprivation of rights secured by the Constitution of the United States.

[1/] Numbers preceded by "A." refer to pages of the Appendix to this petition.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the following constitutional and statutory provisions:

1. The Eighth Amendment to the Constitution of the United States, which provides:

> Excessive bail shall not be required nor excessive fines imposed nor cruel and unusual punishment inflicted.

2. The Sixth Amendment to the Constitution of the United States which provides, in pertinent part:

> In all criminal prosecutions, the accused shall enjoy the right to a ...trial, by an impartial jury....

3. The Fourteenth Amendment to the Constitution of the United States, which provides, in pertinent part:

> No state shall...deprive any person of life, liberty or property without due process of law.

4. This case also involves the provisions of Miss.Code Ann. Sec. 99-19-101 (1972 & Supp. 1982), which are set forth in the Appendix to this petition (A. 19-21).

STATEMENT OF THE CASE

On August 24, 1980, Albert Taylor, a taxicab driver in Jackson, Mississippi, died as the result of blows to the head by a blunt instrument inflicted during the course of a robbery. (A. 1.) A petit jury in the Circuit Court of the First Judicial District of Hinds County, Mississippi, subsequently convicted petitioner George David Tokman of the capital murder of Mr. Taylor, and sentenced petitioner to death. (Id.)

As the case comes to this Court, the Supreme Court of Mississippi has sustained petitioner's sentence of death against challenges (1) that a sentence of death is constitutionally impermissible in light of the fact that petitioner was 17 years of age at the time of the offense (A. 12-13);[2/] (2) that the jury was unconstitutionally permitted to find two statutory aggravating circumstances from evidence which allowed a finding of only one such circumstance (A. 7-8); (3) that the jury was unconstitutionally instructed that petitioner could be sentenced to death upon a finding that the offense was

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[2/] The opinion of the Mississippi Supreme Court poses this issue as whether, in light of petitioner's youth, "the sentence of death imposed by the jury was contrary to the weight of the evidence and disproportionately severe for the crime committed." (A. 12). However, petitioner's request for rehearing in the Mississippi Supreme Court specifically framed the question whether "the death sentence should be reversed because [petitioner] was seventeen years old at the time of the crime," Petition for Rehearing, p. 3, and the issue is thus properly raised here. Hathorn v. Lovorn, 457 U.S. 255 (1982).

"especially heinous, atrocious or cruel," without any additional guidance provided as to the meaning of the phrase "especially heinous, atrocious or cruel" (A. 8-10); and that a prospective juror was unconstitutionally excused for cause after he initially indicated on voir dire that he harbored conscientious scruples against infliction of the death penalty, but later stated that he could vote to impose the death penalty in an appropriate case (A. 3-4).

In view of the Mississippi Supreme Court's findings and conclusions, a detailed statement of the facts and proceedings is unnecessary for consideration of the issues presented herein. Additional aspects of the proceedings below are developed with the discussions of these issues where helpful.

REASONS FOR GRANTING THE WRIT

For the reasons which follow, this Court should issue a writ of certiorari to review the decision of the Supreme Court of Mississippi.

I. THIS COURT SHOULD GRANT CERTIORARI TO CONSIDER WHETHER INFLICTION OF THE DEATH PENALTY ON AN ADOLESCENT UNDER THE AGE OF 18 AT THE TIME OF THE OFFENSE CONSTITUTES CRUEL AND UNUSUAL PUNISHMENT IN VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENTS.

Petitioner was 17 years of age at the time of the commission of the offense for which he was sentenced to die. In light of the "evolving standards of decency that mark the progress of a maturing society," Trop v. Dulles, 356 U.S. 86, 101 (1959), petitioner asserts that Mississippi should be precluded by the Eighth and Fourteenth Amendments to the Constitution from inflicting the penalty of death upon an adolescent who was under the age of 18 at the time of the commission of his offense.

The question is manifestly a substantial one. This Court has frequently stated that the youth of the offender is an appropriate mitigating factor in capital cases. Bell v. Ohio, 438 U.S. 637 (1978); Lockett v. Ohio, 438 U.S. 586 (1978); Roberts v. Louisiana, 431 U.S. 633, 636-637 (1977); Jurek v. Texas, 428 U.S. 262 (1976); Gregg v. Georgia, 428 U.S. 153, 197 (1976). And in Eddings v. Oklahoma, 455 U. S. 104 (1981), the Court granted certiorari to consider the question whether infliction of the death penalty on a child who was sixteen at the time of the crime

constituted cruel and unusual punishment under the Eighth and Fourteenth Amendments.

However, the Court in Eddings reserved resolution of the question upon a holding that the case should be remanded for a second sentencing proceeding in conformity with Lockett v. Ohio, supra; the majority in Eddings simply restated the principle that the "chronological age of a minor is itself a relevant mitigating factor of great weight...." 455 U. S. at 116. In a separate concurring opinion, Justice O'Connor stated this view of the majority's holding:

> I...do not read the Court's opinion either as altering this Court's opinions establishing the constitutionality of the death penalty or as deciding the issue of whether the Constitution permits imposition of the death penalty on an individual who committed a murder at age 16. [Id. at 119.]

As one commentator has observed, "[t]he constitutional question is thus left in limbo." Streib, Death Penalty for Children: The American Experience With Capital Punishment for Crimes Committed While Under Age Eighteen 16 (1983).[3/] Petitioner submits that the question should now be removed from "limbo," and definitively answered by this Court.

It is, of course, clear that in non-capital contexts, the Eighth Amendment places substantive limits on the power of the state to impose a sentence that is disproportionate to the severity of the offense, Soler v. Helms, ___U.S.___ (1983), and that in capital cases, too, the Eighth Amendment may prohibit the infliction of death as cruel and unusual punishment for certain offenses. Coker v. Georgia, 433 U.S. 584 (1977) (death penalty for rape is excessive and grossly out of proportion to the crime). In Coker, the Court determined that the punishment of death for rapists was constitutionally excessive by looking to objective factors such as "public attitudes concerning a particular sentence, history and precedent, legislative attitudes and the response of juries reflected in their sentencing decisions." Id. at 592. All of those factors likewise militate toward the conclusion that imposition of the death penalty on children and adolescents is constitutionally impermissible.

[3/] Professor Streib's article will be published in a forthcoming issue of the OKLAHOMA LAW REVIEW.

In Gregg v. Georgia, supra, the Court observed that the response of state legislatures to Furman v. Georgia, 408 U. S. 238 (1972), is "the most marked indication of society's endorsement of the death penalty." 428 U.S. at 179. By that measure, societal endorsement of the death penalty for juveniles is lukewarm, at best. Of the thirty-seven presumptively valid death penalty statutes now on the books, eight prohibit execution of offenders whose crimes were committed under the age of sixteen,[4/] seventeen[5/] or eighteen,[6/] while nineteen other statutes expressly designate the offender's youth as a mitigating factor.[7/] Thus, a strong majority of the states which have enacted death penalty statutes after Furman v. Georgia have mandated either that youth is a decisive factor in capital cases and that accordingly the death penalty may not be inflicted as a punishment on young people under certain ages,[8/] or that youth is an important mitigating circumstance to be considered in such cases.[9/]

[4/] NEV. REV. STAT. Sec. 175.025 (1973 & Supp. 1977).

[5/] TEXAS PENAL CODE ANN., tit. 2, §8.07(d) (Vernon Supp. 1980-1981).

[6/] CAL. PENAL CODE §190.5 (West Supp. 1980); COLO. REV. STAT. §16-11-103(5)(a)(1978); CONN. GEN. STAT. ANN. §53a-46a(f)(1)(West Supp. 1980); and ILL. REV. STAT. ch. 38, §9-1(b)(Smith Hurd Supp. 1978); OHIO REV. CODE §2929.02 (Page 1982); TENN. CODE ANN. §37-234(a)(1).

[7/] 1981 ALA. ACTS, §13(g); ARIZ. REV. STAT. §13-703G.5 (Supp. 1980); ARK. STAT. ANN. §41-1304(4) (Supp. 1979); FLA. STAT. ANN. §921.141(6)(g) (West Supp. 1981); KY. REV. STAT. §532.025(b)(8) (Supp. 1980); LA. CODE CRIM. PRO. ANN. art. 905.5(f) (Supp. 1981); MD. CRIM. LAW CODE ANN. §413(g)(5) (Supp. 1980); MISS. CODE ANN. §99-19-101(6)(g) (Supp. 1982); MO. REV. STAT. §565.012 (3)(7) (Supp. 1981); MONT. REV. CODES ANN. §46-18-304(7) (1979); NEB. REV. STAT. §29-2523(2)(d)(1979); N.H. REV. STAT. ANN. §630:5 II (b)(5) (Supp. 1979); N.M. STAT. ANN. §31-20A-6 I (Supp. 1980); N.C. GEN. STAT. §15-A-2000(f)(7) (Supp. 1979); 18 PA. CONS. STAT. ANN. §1311(e)(4) (Purdon 1980); S.C. CODE §16-3-20(c)(b)(7) (Supp. 1980); UTAH CODE ANN. §76-(a)(b)(7) (Supp. 1979); VA. CODE §19.2-264(B)(V) (Supp. 1980); WYO. STAT. ANN. §6-4-102(j) (vii) (Supp. 1980).

[8/] The Model Penal Code likewise rejects capital punishment for offenders under the age of eighteen. MODEL PENAL CODE Sec. 210.6(1)(d) (Proposed Official Draft, 1962).

[9/] No state has enacted a death penalty statute that excludes youth as a mitigating factor.

Furthermore, actual executions of persons under the age of 20 have become quite rare. Prior to 1950, 229 teenagers were executed out of 2,678 executions with available age data; however, since 1950, only 26 teenagers have been executed out of 450 executions with available age data. W. BOWERS, EXECUTIONS IN AMERICA (1974). No person under age 18 has been executed since 1964--almost 20 years ago. Steib, supra at 12.

The international community has condemned executions of young people as well. The Royal Commission on Capital Punishment provided this description of the decline of such executions in England.

> The Children Act, 1908, provided that a person under 16 years of age at the time of conviction should not be sentenced to death but should instead be sentenced to be detained during His Majesty's pleasure. This provision, which applied both to England and Wales and to Scotland, was extended by the Children and Young Person act, 1933...to persons under 18 at the time of conviction; and was further extended by section 16 of the Criminal Justice Act, 1948...to persons under 18 at the time when the offense was committed. No person under 18 years of age had in fact been executed since 1887.

ROYAL COMMISSION REPORT ON CAPITAL PUNISHMENT 1949-195 3 64-65 (1953). And on October 5, 1977, President Carter signed the International Covenant on Civil and Political Rights which provides, in Part III, Art. 6, Cl. 5 that "sentence of death shall not be imposed for crimes committed by persons below eighteen years of age...."[10/]

Since this Court pretermitted decision of the question in Eddings v. Oklahoma, supra, public and professional opinion has continued to coalesce against infliction of the death penalty on juvenile offenders. For example, on August 2, 1983, the House of Delegates of the American Bar Association enacted a resolution which

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[10/] The Covenant has been signed and/or ratified by 73 nations. Many countries have specifically prohibited execution of persons under the age of eighteen, including Bulgaria, Czechoslovakia, German Democratic Republic, Hungary, Poland, Romania, Soviet Union, United Kingdom of Great Britain and Northern Ireland, Antigua, Bahamas, British Virgin Islands, Dominica, Grenada, Guyana, New Zealand, Guatemala and South Africa. Amnesty International Report, THE DEATH PENALTY, ADDENDA AND UPDATE 59-156 (1979).

stated that "the American Bar Association opposes, in principle, the imposition of capital punishment upon any person for any offense committed while under the age of eighteen (18)." The report which accompanied the ABA resolution observed, at p. 10, that "[t]he notion of a governmental agency imposing the death penalty upon a child through its justice proceedings raises the deepest questions about the demands of justice versus the special nature of childhood." 11/

Petitioner urges this Court to provide an answer to those questions, as they apply to him and to the some 25 other young people currently on death row for crimes committed while under the age of 18. 12/ The Eighth Amendment should be construed to eliminate from the controversy over capital punishment any notion that we are willing, as a people, to execute our children and adolescents. Infliction of the death penalty on juveniles is cruel because of the unique manner in which the law of this country has historically treated young people, 13/ and it is unusual because of its rarity in practice and its widespread condemnation. This Court should grant certiorari in this case and settle the issue once and for all.

II. THIS COURT SHOULD GRANT CERTIORARI TO DECIDE WHETHER, IN A CAPITAL CASE, THE EIGHTH AND FOURTEENTH AMENDMENTS PROHIBIT AN INSTRUCTION TO THE JURY THAT IT MAY FIND TWO AGGRAVATING CIRCUMSTANCES WHERE THE FACTS PERMIT A FINDING OF ONLY ONE SUCH CIRCUMSTANCE

11/ The ABA is not alone in condemning application of the death penalty to young people. See, e.g., Editorial, "Capital Punishment for Kids?," The Washington Post A18 (November 8, 1983).

12/ There are presently between 20 and 25 young people under death sentences for crimes committed while under the age of 18. "25 Juveniles on Death Row; Should Age Barriers Be Set?", The National Law Journal 16 (August 8, 1983).

13/ This Court's opinions, for example, have often recognized "the peculiar vulnerability of children," and "their inability to make critical decisions in an informed, mature manner." Bellotti v. Baird, 443 U. S. 622, 634 (1979) (plurality opinion). Moreover, the Court has not limited its view of the vulnerabilities of age to young children: "Most children, even in adolescence, simply are not able to make sound judgments...." Parham v. J.R., 442 U. S. 584, 603 (1979). See also, e.g., Haley v. Ohio, 332U.S. 596 (1948).

Miss. Code Ann. Sec. 99-19-101(2)(b) provides that in a capital case the jury shall determine "[w]hether sufficient mitigating circumstances exist...which outweigh the aggravating circumstances found to exist...." Section 99-19-101(5)(d) lists as an aggravating circumstance whether "[t]he capital offense was committed while the defendant was engaged, or was an accomplice, in the commission of, or an attempt to commit...any robbery," and Section 99-19-101(5)(f) lists as another aggravating circumstance whether "[t]he capital offense was committed for pecuniary gain." In petitioner's case, the jury was instructed that because the homicide at issue occurred during the course of a robbery, the jury could find the existence of two aggravating circumstances under both Sections 99-19-105(d) and (f), and that it could then weigh both aggravating circumstances against whatever mitigating circumstances might appear.

Petitioner argued to the Mississippi Supreme Court that the instruction "was improper because it permitted the * * * doubling of aggravating circumstances (saying the same thing twice) when the evidence would permit only one aggravating circumstance." (A. 7.) The court simply rejected petitioner's argument with a non sequitur: "...we think an indictment, as here, charging capital murder in the course of a robbery permits instructions on both 'robbery' and 'pecuniary gain' as aggravating circumstances because the evidence supports both as it reveals the robbery was committed for pecuniary gain during the course of which the homicide occurred." (Id.)[14/]

Clearly the more sensible view is that reflected in Cook v. State, 369 So.2d 1251, 1256 (Ala. 1978), where the court, construing an identical statutory scheme, found it impermissible to "in effect condemn...[a defendant] twice for the same culpable act--stealing money." See also Provence v. State, 337 So.2d 783, 786 (Fla. 1976), where the court said, in construing another identical statutory scheme, that while in some cases the two aggravating factors might legitimately:

[14/] The court did not explain how a murder occurring in the course of a robbery could not be committed for pecuniary gain. Of course, it is obvious that all murders committed for pecuniary gain do not occur in the course of robberies--e.g., so-called "contract killings."

> ...refer to separate analytical concepts and...validly be considered to constitute two circumstances, here, as in all robbery-murders, both subsections refer to the same aspect of the defendant's crime. Consequently, one who commits a capital crime in the course of a robbery will always begin with two aggravating circumstances against him while those who commit such a crime in the course of any other enumerated felony will not be similarly disadvantaged. Mindful that our decision in death penalty cases must result from more than a simple summing of aggravating and mitigating circumstances, we believe that [defendant's] pecuniary motive at the time of the murder constitutes only one factor which we must consider in this case. [Emphasis in original; citation omitted.]

This Court has repeatedly emphasized that the Eighth and Fourteenth Amendments do not permit a sentence of death to be imposed in an arbitrary and capricious manner. E.g., Gregg v. Georgia, supra; Proffitt v. Florida, 428 U.S. 242 (1980); Furman v. Georgia, supra. It is difficult to imagine a more arbitrary and capricious instruction than one which tells a jury that even though the facts reveal the presence of only one statutory aggravating circumstance, the jury is nevertheless free to find the presence of two such circumstances, and to weigh them both in the life or death balance. Consequently, the Court should grant certiorari to decide whether petitioner was deprived of a fair sentencing proceeding by this instruction.

III. THIS COURT SHOULD GRANT CERTIORARI TO DECIDE WHETHER THE EIGHTH AND FOURTEENTH AMENDMENTS WERE VIOLATED WHEN THE JURY WAS INSTRUCTED THAT PETITIONER COULD BE SENTENCED TO DEATH UPON A FINDING THAT THE OFFENSE WAS "ESPECIALLY HEINOUS, ATROCIOUS OR CRUEL," WITHOUT ANY ADDITIONAL GUIDANCE PROVIDED TO THE JURY AS TO THE MEANING OF THAT PHRASE

The jury in petitioner's case was instructed, pursuant to Miss. Code Ann. Sec. 99-19-101(5)(h), that petitioner could be sentenced to death if the jury found that "[t]he capital offense was especially heinous, atrocious or cruel;" the trial court, however, did not provide the jury with any explication at all of the meaning of the phrase "especially heinous, atrocious or cruel." The Mississippi Supreme Court subsequently rejected petitioner's contention that "these words are unconstitutionally vague and ambiguous" (A. 8), as well as his argument that "[t]he finding of the jury that the

capital murder was especially heinous, atrocious or cruel is...without evidentiary foundation and contrary to the overwhelming weight of the evidence" (A. 9).

This phrase has had a checkered history in death penalty litigation. See, e.g., People v. Superior Court (Engert), 31 Cal. 3d 797, 183 Cal. Rptr. 800, 647 P.2d 76 (1982) (provision of California's death penalty statute making heinousness or atrociousness of crime an aggravating circumstance void for vagueness on ground that words have no directive content). The facial constitutionality of similar phraselogy was upheld by this Court in Gregg v. Georgia, 428 U.S. 153 (1976), but only with the caveat that a solution to the inherent imprecision of the statutory language must be provided either through limiting jury instructions by trial courts, or by appellate court review of the applicability of the phrase to the facts of particular cases. Thus, in Gregg the Court declined to hold that this statutory phrase would always be found constitutional, and warned against its being given an "open-ended construction." Id. at 201 (opinion of Stewart, Powell and Stevens, JJ.).

The language next came before the Court in Godfrey v. Georgia, 446 U. S. 420 (1980), where the Court concluded that a death sentence was constitutionally infirm because it was "based upon no more than a finding that the offense was 'outrageously or wantonly vile, horrible and inhuman." Id. at 428 (footnote omitted). The Court explained that:

> There is nothing in these few words, standing alone, that implies any inherent restraint on the arbitrary and capricious infliction of the death sentence. A person of ordinary sensibility could fairly characterize almost every murder as "outrageously or wantonly vile, horrible and inhuman." Such a view may, in fact, have been one to which the members of the jury in this case subscribed. If so, their preconceptions were not dispelled by the trial judge's sentencing instructions. These gave the jury no guidance concerning the meaning of any of [the statutory] terms. In fact, the jury's interpretation of [the statutory language] can only be the subject of sheer speculation. [Id. at 428-429.]

Likewise in petitioner's case, the jury's interpretation of the "especially heinous, atrocious or cruel" language of Section 99-19-101(5)(h) could only have been entirely speculative. To be sure, in Washington v. State, 361 So.

KARR & LYONS
WASHINGTON, D.C. 20009
(202) 797-8566

2d 61, 65 (Miss. 1978), the Supreme Court of Mississippi held that the phrase is "not confusing nor likely to be misunderstood by the average citizen" because "[h]e comes in contact with these words frequently, if not in personal conversation at least through the news media of television, radio, or the press." However, a capital sentencing scheme which is so amorphous as to turn upon jurors' presumed "contact" with crucial statutory language in "the news media of television, radio or the press" is patently insufficient to ensure a rational sentencing decision based upon clear and objective standards.

Moreover, the trial court's failure to give a limiting instruction was particularly mystifying in light of the fact that the Mississippi Supreme Court placed a limiting construction on Section 99-19-101(5)(h) in Coleman v. State, 378 So. 2d 640, 648 (Miss. 1979), where, in the course of a terse two-paragraph passage rejecting a vagueness attack on the section, the court quoted with approval Spinkellink v. Wainwright, 578 F. 2d 582, 611 (5th Cir. 1978), to the effect that the language of the section denotes "the conscienceless or pitiless crime which is unnecessarily tortuous to the victim." Compare Profitt v. Florida, 428 U.S. 242, 255-256 (1976). Four members of the Mississippi Supreme Court have recently concluded that because "[i]t is obvious that the average juror does not know our own narrow construction of the phrase 'especially heinous, atrocious or cruel,'" a capital sentence rendered by a jury which was not provided with a limiting instruction on this language cannot pass constitutional muster under the standards of Godfrey v. Georgia, supra. Edwards v. Mississippi, S. Ct. Miss. No. 53,800 (en banc)(disssenting opinion of Prather, J., joined by Patterson, C.J., Hawkins and Roberton, JJ.) (slip op. at 15). This Court should grant certiorari to decide the substantial constitutional question which was posed by the Edwards dissenters, and which was decided adversely to petitioner in this case. 15/

15/ Petitioner concedes that even if the "especially heinous, atrocious or cruel" aggravating circumstance, as well as one of the two aggravating circumstances which were impermissibly doubled (see pp. 7-9, supra), were eliminated from the case, there nevertheless would remain two aggravating circumstances found by the jury which are not attacked in this petition. However, given the fact that the jury in petitioner's case did not find the total absence of mitigating circumstances, but rather simply found that the aggravating circumstances outweighed the mitigating circumstances which were present, vacation of the death sentence in this case would be required even under the teaching of Zant v. O'Daniel, __U.S.__(1983), and Barclay v. Florida, __U.S.__(1983). See Edwards v. Mississippi, supra (dissenting opinion of Prather, J., joined by Patterson, CL.J. Hawkins and Roberts, JJ.). That is especially so in light of the presence in this case of one very strong mitigating factor, i.e., petitioner's youth. See dissenting opinion of Hawkins, J., joined by D. Lee, J., pp. A. 16-18.

IV. THIS COURT SHOULD GRANT CERTIORARI TO CONSIDER WHETHER THE SIXTH AND FOURTEENTH AMENDMENTS WERE VIOLATED BY THE EXCLUSION FOR CAUSE OF A JUROR WHO INDICATED THAT HE COULD IMPOSE THE DEATH PENALTY IN AN APPROPRIATE CASE EVEN THOUGH HE HARBORED CONSCIENTIOUS SCRUPLES AGAINST THE DEATH PENALTY IN GENERAL

During the voir dire in this case, a prospective juror, Mr. Dewitt Jordan, indicated that he held conscientious scruples against infliction of the death penalty. However, under questioning by petitioner's trial counsel, the following colloquy ensued:

> BY [DEFENSE COUNSEL]:
>
> * * * Mr. Jordan, with respect to the death penalty, you understand that, if you serve on the jury and find the Defendant guilty, you go into the second phase but it does not necessarily mean under the law that you have to give him the death penalty. You understand that, don't you?
>
> BY MR. JORDAN:
>
> Yes, sir.
>
> BY [DEFENSE COUNSEL]:
>
> Now, you indicated that it would be difficult for you or you didn't think you could or whatever but I'll ask you whether or not in your mind there is no case, no matter what type the crime or how vicious or whatever it is, you could not vote for the death penalty.
>
> (No response)
>
> BY [DEFENSE COUNSEL]:
>
> Think about it if you will. Not this case but any case.
>
> BY MR. JORDAN:
>
> It might depend.
>
> BY [DEFENSE COUNSEL]:
>
> Pardon me?
>
> BY MR. JORDAN:
>
> It might depend.

BY [DEFENSE COUNSEL]:

It might depend?

BY MR. JORDAN:

Yes.

BY [DEFENSE COUNSEL]:

So there is the possibility that you could vote for the death penalty in a case if the facts warranted in your mind the crime was heinous enough or bad enough.

BY MR. JORDAN:

Yes, sir. [16/]

Nevertheless, despite Mr. Jordan's agreement that he was not so opposed to capital punishment that he could never inflict it on a defendant, Mr. Jordan, over petitioner's objection, was excused for cause.

In Witherspoon v. Illinois, 391 U. S. 510, 523 n. 21 (1968), this Court said that under the Sixth and Fourteenth Amendments:

> The most that can be demanded of a venireman in this regard is that he be willing to consider all of the penalties provided by state law, and that he not be irrevocably committed, before the trial has begun, to vote against the penalty of death regardless of the facts and circumstances that might emerge in the course of the proceedings. If the voir dire testimony in a given case indicates that veniremen were excluded on any broader basis than this, the death sentence cannot be carried out... [Emphasis in original.]

Compare Adams v. Texas, 448 U.S. 38 (1980). Certiorari should be granted so that the Court might decide whether petitioner was deprived of a fair and impartial jury by exclusion of this member of the venire.

CONCLUSION

For all of the foregoing reasons, petitioner prays that a writ of certiorari issue to review the judgment of the Supreme Court of Mississippi.

16/ Trial Transcript, pp. 223-224.

IN THE SUPREME COURT OF MISSISSIPPI

NO. 53,676

GEORGE DAVID TOKMAN

v.

STATE OF MISSISSIPPI

EN BANC.

PATTERSON, CHIEF JUSTICE, FOR THE COURT:

George David Tokman appeals a conviction of capital murder and sentence of death by a jury in the Circuit Court of the First Judicial District of Hinds County. It is a companion case to Leatherwood v. State, No. 53,914 (Miss., decided May 25, 1983, not yet reported).

Shortly after midnight on August 24, 1980, Sergeant Addison of the Jackson Police Department observed a Veterans Cab parked behind Meadowbrook Cinema. Lying beside the cab was the body of a black male, later identified as that of Albert Taylor, 65 years of age. An autopsy revealed his death resulted from blows to the head by a dull blunt instrument. Other investigation disclosed a latent fingerprint taken from the right rear window of the cab matched that of Tokman.

Diane Pettway, a nurse at Regional Medical Center in Vicksburg, testified that on August 24, 1980, at approximately 1:30 a.m., three white males came into the emergency room of the center and one, who identified himself as George David Tokman, age 17, had blood on his clothes and a cut on his hand. She testified Tokman was treated by placing five stitches in his right hand between the knuckle and the wrist.

Jeffery Booth testified that on August 29, 1980, while in the Army and stationed at Fort Polk, Louisiana, he was associated with George David Tokman, Michael Leatherwood and Jerry Fuson. He stated that Tokman told him that he, Leatherwood and Fuson had killed a cab driver in Jackson, Mississippi. According to him, Tokman displayed a newspaper account of the murder and bragged of the incident.

More detailed facts of the crime were established by the testimony of Jerry Booth, James Kellison, also stationed at Fort Polk, and Jerry Fuson.

On or about August 22, 1980, Tokman, Fuson and Leatherwood, all in the military and stationed at Fort Polk, Louisiana, were in Jackson, Mississippi, to obtain Fuson's car which had been previously left in the city. After remaining in Jackson for about a day and a half the three decided they would rob a cab driver since they were without funds. According to Fuson's testimony Leatherwood and Tokman decided they would kill the victim. The first cab called was driven by a young, large driver who they thought would be difficult to manhandle so a second cab was called which was driven by Albert Taylor, an elderly man.

The three entered Taylor's cab, with Fuson occupying the passenger's side of the front seat, Leatherwood occupying the left side of the rear seat and Tokman occupying the right side of the rear seat. They directed the driver to an address on Beaverbrook and upon arriving there requested him to dim his lights whereupon Leatherwood placed a rope around the driver's neck and pulled him into the back seat. Meanwhile Fuson stopped the cab and Tokman came to the driver's seat and drove the cab to the rear of Meadowbrook Cinema. Fuson then left the cab to obtain his car and upon returning for Leatherwood and Tokman observed that Tokman's hand was cut. After departing the scene Leatherwood made the statement that Tokman stabbed him, not denied by Tokman, and later Tokman stated

that he had cut his hand while stabbing the cab driver. Further evidence revealed that Taylor was robbed of approximately $11.50, a pistol, his wallet, two money bags and a set of keys.

Tokman first contends the trial court erred in granting the state's challenge to venireman Dewitt Jordan for cause. He argues this was error under Witherspoon v. Illinois, 391 U.S. 510, 88 S.Ct. 1770, 20 L.Ed.2d 776 (1968). Jordan expressed conscientious scruples against the death penalty during voir dire of the jury by the prosecution. Later the court, after explaining that the first part of the trial dealt only with the guilt or innocence of the defendant and not with the imposition of the death penalty, asked the following question: "That is, during the first phase, could you still vote guilty even though that could result in the death penalty after the jury considers it in the second phase?" Jordan replied, "I don't think I could." When asked by the prosecution whether it was correct that he was saying that he could not vote guilty knowing it could result in the death penalty Jordan replied, "Yes, sir."

In Evans v. State, 422 So. 2d 737 (Miss. 1982), we reiterated the procedures we had approved in Irving v. State, 361 So. 2d 1360 (Miss. 1978). We there stated:

> Following Witherspoon, this Court considered the procedure to be employed by trial judges in Myers v. State, 254 So. 2d 891 (Miss. 1971). That procedure follows:
>
> "'The proper method of bringing the death penalty to the attention of the special veniremen is for the trial judge to inform them that they have been summoned as veniremen in a capital case and that a verdict of guilty could result in the infliction of the death penalty. The judge should then ask them if any member of the panel has any conscientious scruples against the infliction of the death penalty, when the law authorizes it, in proper cases, and where the testimony warrants it. If there are those who say that they are opposed to the death penalty, the trial judge should then go further and ask those veniremen, who have answered in the affirmative, whether or not they could, nevertheless, follow the testimony and the instructions of the court and return a verdict of guilty although that verdict could result in the death penalty, if they, being the judges of the weight and worth of the evidence, were convinced of the guilt of the defendant and the circumstances warranted such a verdict. Those who say that they could follow the evidence and the instructions

of the court should be retained, and those who cannot follow the instructions of the court should be released. The mere fact that a venireman is opposed to the death penalty does not disqualify him as a juryman, if he can do his duty as a citizen and juror and follow the instructions of the court, and where he is convinced of the defendant's guilt he can convict him although the verdict of the jury may result in the death penalty's being inflicted upon the defendant.' (Emphasis added). Armstrong v. State, Miss., 214 So. 2d 589, at 593." 254 So. 2d at 893-94. [361 So. 2d at 1360].

422 So. 2d at 740-41.

The trial court meticulously followed the procedure outlined in Evans although the prospective juror was somewhat rehabilitated by questions of defense counsel, one of which was,

"BY MR. MOORE: So there is the possibility that you could vote for the death penalty in a case if the facts warranted in your mind the crime was heinous enough or bad enough.

BY MR. JORDAN: Yes, sir."

Nevertheless, a review of Jordan's overall responses to questions by the state and defense counsel portrays the prevailing tenet that he was opposed to the death penalty and could not be a fair and impartial juror for the state. We therefore are of the opinion the trial court did not err in dismissing venireman Jordan for cause.

The appellant next contends there was error in granting State's instruction No. S-3 in that the Mississippi statutes on capital murder are unconstitutional. Under the decisions in Bullock v. State, 391 So. 2d 601 (Miss. 1981) and Coleman v. State, 378 So. 2d 640 (Miss. 1979), this assignment of error is without merit.

In Tokman's third assignment for reversal he argues the trial court erred in restricting the cross-examination of State's witness Kellison concerning prior convictions and false statements made upon entering the United States Army. The witness was asked by defense counsel whether at the time of his enlistment he informed the Army of his convictions before he was 17 years of age to which Kellison replied that he told the recruiter but the convictions were not listed. Kellison was then asked whether he had to sign

something attesting to the truthfulness of the information he gave the Army and an objection based upon the inadmissibility of convictions under the Youth Act was sustained. From this exchange Tokman now contends the information was admissible as a material factor reflecting upon Kellison's truthfulness in his answers. The trial court questioned the materiality of such testimony and ruled that it was improper.

In Shanklin v. State, 290 So. 2d 625, 627 (Miss. 1974), we stated: "A defendant can, of course, question a witness to determine his credibility as a witness; but as to how far afield the testimony may be extended is largely within the sound discretion of the trial judge." We are presently of the opinion the trial court did not abuse its discretion in sustaining the objections to this testimony since, at best, it appears remote to the witnesses present credibility.

It is next contended there was error in admitting as an aggravating circumstance during the sentencing phase of the trial a record of Tokman's armed robbery conviction on February 20, 1981, the robbery having been committed one day after the murder of Taylor. He argues the aggravating circumstance was improper under Miss. Code Ann. § 99-19-101(5)(b) (Supp. 1982), because the statute reads "The defendant was previously convicted of another capital offense or of a felony involving the use or threat of violence to the person," (Emphasis added). He emphasizes the statute refers to a conviction prior to the commission of the act for which he was being sentenced and therefore was inadmissible.

We addressed the identical question in Leatherwood v. State, No. 53,914, (Miss., decided May 25, 1983 , not yet reported), as follows:

> This Court has ruled that "previously" means previous "to the time of the trial, so that a conviction between the time the capital offense was committed and the time of trial for it may be admitted into evidence as an aggravating circumstance." Jones v. State, 381 So. 2d 983, 994 (Miss. 1980); Reddix v. State, 381 So. 2d 999 (Miss. 1980) . . .

* * *

> Crimes committed by a defendant after having committed a capital offense have just as much or more bearing on the question of his character, criminal tendencies, and whether he should suffer the death penalty, as do crimes committed by him prior to having committed the capital offense.

We conclude this assignment is without merit.

The appellant next argues there was error in granting State's instruction S-4 because it permitted the jury to consider as aggravating circumstances, the murder was committed while Tokman was engaged in a robbery, was committed for pecuniary gain, and the homicide was especially heinous, atrocious or cruel. When the instructions were being considered by the trial court Tokman objected to S-4 only upon the grounds "that an aggravating circumstance is that capital murder was committed while the defendant was engaged in the commission of a robbery and that is an element of capital murder itself." We are required to consider only that portion of the assignment of error which is related to the objection. Leatherwood v. State, No. 53,914, supra; Smith v. State, 419 So. 2d 563 (Miss. 1982). However we address each.

It is contended however that Tokman was on trial for capital murder only because under Miss. Code Ann. § 97-3-19 (Supp. 1982), he killed Taylor while engaged in a robbery, and to instruct the jury that murder while committing robbery is an aggravating circumstance is tantamount to instructing the jury that after a finding of guilty, he already has one aggravating circumstance against him, sufficient to impose the death penalty.

Again, we find this contention was addressed in Leatherwood wherein we found the argument to be without merit under the following rationale:

> The appellant's argument that he enters into the sentencing phase of the bifurcated trial with one strike against him is correct in one sense - - i.e., if he had not been convicted of a capital offense, there would be no need for the sentencing hearing and he would simply be sentenced to serve a life term. This does not mean though that the procedure is unfair or faulty.

> At the sentencing hearing appellant may put on evidence of mitigating circumstances of an unlimited nature pursuant to section 99-19-101 (6) (Supp. 1982) and Washington v. State, 361 So. 2d 61 (1970), so as to convince the jury that he should not be executed.

Of course a jury in a capital case must find the defendant guilty of the attendant crime before the homicide attains capital status. Because it is an essential adjunct to the finding of guilty of capital murder, it becomes a relevant aggravating circumstance, in our opinion, to be considered by the jury in determining the sentence and as such it is not error.

It is additionally urged that instruction S-4 was improper because it permitted the jury to consider as an aggravating circumstance that the capital murder was committed for pecuniary gain. The thrust of this argument is the instruction permits the doubling of aggravating circumstances (saying the same thing twice) when the evidence would permit only one aggravating circumstance. Section 99-19-101(5)(d) lists robbery as an aggravating circumstance which in conjunction with a homicide will elevate it to capital murder. Sub-section (f) gives the aggravating circumstance, "The capital offense was committed for pecuniary gain," the same potential of elevating a homicide to capital murder. But we think an indictment, as here, charging capital murder in the course of a robbery permits instructions on both "robbery" and "pecuniary gain" as aggravating circumstances because the evidence supports both as it reveals the robbery was committed for pecuniary gain during the course of which the homicide occurred. They are inextricably intertwined in this case in our opinion. We gather from the argument there is a belief in some segments of the bar that the death sentence is imposed or is not imposed numerically.[1] However, this belief is contrary to § 99-19-101(2)(b) which provides for a "weighing" by the jury of the aggravating and mitigating

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[1] I.e., two aggravating circumstances and one mitigating circumstance require the imposition of the death sentence or conversely one aggravating circumstance and two mitigating circumstances require a life sentence.

circumstances in the sentencing phase and our decisions accord with this directive.

In Coleman v. State, 378 So. 2d 640, 646 (Miss. 1979), we held among other things the following,

> Subsection 5 of § 99-19-101 limits the aggravating circumstances to eight, but proof of one or more of these aggravating circumstances may still be found insufficient by the jury to require death. Throughout the trial on the sentencing phase, the state carries the burden of showing not only that aggravating circumstances exists but also that they are sufficient enough to warrant death. If the state merely proves the existence of an aggravating circumstance, the jury is free to find it insufficient to warrant death and is not required to automatically impose death.

We conclude there was no error in instruction S-4 arising from the aggravating circumstance of murder for "pecuniary gain."

Another argument is directed to instruction S-4 in that it permits the jury to find an aggravating circumstance if they believed the capital offense was especially heinous, atrocious, or cruel because these words are unconstitutionally vague and ambiguous. This point was the subject of discussion in Washington v. State, 361 So. 2d 61 (Miss. 1978), wherein we held:

> We must remember that the twelve members of the trial jury were a jury of the defendant's peers, and came from the county of the defendant's residence. The jury was composed of average citizens possessing average intelligence, a cross-section, if you please, of the citizenry of the community. In our opinion the words "especially heinous, atrocious or cruel" are not confusing nor likely to be misunderstood by the average citizen. The average citizen has a reasonable knowledge of the generally accepted meaning of these words. He comes in contact with these words frequently, if not in personal conversation at least through the news media of television, radio or the prese.
>
> * * *
>
> The facts in no two cases are exactly identical and no precise definition or formula can be made to cover every possible factual situation.
>
> It is our considered opinion that the average jury in its sound discretion and judgment understands the generally accepted meaning of the words "especially heinous, atrocious or cruel" and is able to apply these words to different factual situations without further definition of these words.
>
> 361 So. 2d at 65-6.

This holding was reaffirmed in Coleman v. State, 378 So. 2d 640, 648 (Miss. 1979). More recently it was again addressed in

Hezekiah Edwards v. State, No. 53,800, (Miss., Decided 3/16/83, not yet reported). The author of this opinion joined the dissent of Justice Prather in her reasoning and belief that the language is vague. However, a majority of the court ruled otherwise and I presently yield to their views. Overall we are of the opinion instruction S-4 was not erroneously given and did not prejudice the appellant.

We are buttressed in the above determinations by a countervailing instruction which was granted. It follows, "You are instructed that you need not find any mitigating circumstances in order to return a sentence of life imprisonment." The jury was thus informed they could disregard all aggravating circumstances, even in the absence of mitigating circumstances, and return a sentence of life imprisonment if they believe it was warranted. We therefore think Tokman's contention on all points in this assignment of error are without merit.

The finding of the jury that the capital murder was especially heinous, atrocious or cruel is urged by the appellant as being without evidentiary foundation and contrary to the overwhelming weight of the evidence, as appellant's next assignment of error.

The evidence, in our opinion, supports the jury's verdict that the murder was especially heinous, atrocious or cruel where the testimony reveals without contradiction that the homicide was the result of deliberate plan, where the victim was pulled from the driver's seat of his cab into the back seat by a rope around his neck, where he struggled for some several minutes while being driven to the rear of the cinema and where he was bludgeoned to death by a knife which at some point during the struggle closed on the assailant's hand. Moreover the jury found the murder was committed while the defendant was engaged in the commission of a robbery, was committed for pecuniary gain and was committed for the purpose of avoiding lawful arrest, which in addition to the aggravating circumstances previously mentioned was supported by the evidence in our opinion. We stated in Evans v. State, 422 So.

2d 737, 743 (Miss. 1982), "Even though it may be said that the facts of the homicide do not pass constitutional muster on the aggravating circumstance of being especially heinous, atrocious or cruel, three (3) other aggravating circumstances were proved by overwhelming evidence." Therefore, we think this assignment for reversal is without merit.

The jury's finding that the capital murder was committed for the purpose of avoiding lawful arrest is next contended by appellant to be without evidentiary foundation and against the overwhelming weight of the evidence. In our opinion the following testimony of Fusón, a witness for the state, completely refutes this argument.

"[Fuson]

A. It was Mike Leatherwood's idea about a witness. He didn't want to leave a witness.

[Peters]

Q. So, it was your idea first that there would be a robbery.

A. Right.

Q. Whose idea was it next about whether to kill the witness?

A. Well, I believe Mike Leatherwood and David Tokman decided that. You know, I was against killing the cab driver. I didn't really speak up but, you know, at that time, I was against killing the cab driver but I really didn't say anything against kill the cab driver.

Q. How long was it before the cab driver was called to the scene that they discussed killing him and to not leave a witness?

A. It wasn't very long. It couldn't have been more than forty-five minutes."

In Leatherwood we held that the jury could properly consider such evidence, "[i]f there is evidence from which it may be reasonably inferred that a substantial reason for the killing was to conceal the identity of the killer or killers or to 'cover their tracks' so as to avoid apprehension and eventual arrest

by the authorities." It is, of course, also one of the aggravatin circumstances authorized by § 99-19-101(5)(e). We therefore think this assignment is without merit.

The trial court refused appellant's request for instruction D-11 which follows: "You are further instructed that there is nothing which would suggest that the decision to afford an individual Defendant mercy violates the laws of this state, or your oath as jurors." It is now contended that this was error.

In Bullock v. State, 391 So. 2d 601 (Miss. 1981), we stated:

> Instruction D-31 would have told the jury it was instructed there is nothing that would suggest the decision to afford an individual defendant mercy violates the constitution. That statement was taken from language set forth in the opinion of Gregg v. Georgia, 428 U.S. 153, 96 S.Ct. 2909, 14 L.Ed.2d 859 (1976). It is simply a statement of the opinion, and was not intended as an abstract proposition of law to be given in jury instructions. 391 So.2d at 610.

But conceding the refusal of the instruction as error for the following statement only, it was cured by the granting of the previously mentioned instruction which states, "You are instructed that you need not find any mitigating circumstances in order to return a sentence of life imprisonment." The refusal of the instruction was not error.

The next assignment of error also concerns the refusal of an instruction, D-14, requested by the appellant. The trial court found instruction D-14 to be repetitious to instruction S-4 which was granted at the state's request. Both instructions contain statements that mitigating circumstances are not limited to those read to the jury. When the state objected to the instruction on the ground of repetition the only statement made by Tokman's counsel for the instruction's allowance was,"The defense does not think it would hurt to let them know that one more time." Perhaps so, but in Ragen v. State, 318 So. 2d 879, 882 (Miss. 1975), we stated, "[t]he trial court is not required to grant several instructions on the same question in a different verbiage." We

think this is the proper rule of law and note further that instruction D-12, obtained by the defendant, in effect states the jury need not find any mitigating circumstances in order to sentence Tokman to life imprisonment. It negated any prejudice or harm which might have resulted from refusing instruction D-14.

Tokman's final contention is the sentence of death imposed by the jury was contrary to the weight of the evidence and disporportionately severe for the crime committed.

Defense counsel vigorously argued in mitigation of the death penalty that Tokman was only seventeen years of age at the time of the homicide and eighteen at the time of trial and because of his immaturity advised them that if he took the stand to testify in his own behalf he would tell the jury that he wanted to die. The attorneys further call to our attention that the record is void of any previous anti-social behavior by Tokman other than that at the time of this murder and robbery.

In Eddings v. Oklahoma, 455 U.S. 104, 102 S.Ct. 869, 71 L.Ed. 2d 1 (1982), the United States Supreme Court reversed and remanded that cause based upon the imposition of the death penalty upon a youth, sixteen at the time he committed the murder, where the trial court refused to consider, as offered by the youth, mitigating circumstances of the youth's "unhappy upbringing and emotional disturbance." 455 U.S. at 109. It need be observed that the Court did not hold that a minor, because of his youth, may not be sentenced to death, but stated:

> All of this does not suggest an absence of responsibility for the crime of murder, deliberately committed in this case. Rather, it is to say that just as the chronological age of a minor is itself a relevant mitigating factor of great weight, so must the background and mental and emotional development of a youthful defendant be duly considered in sentencing.

455 U.S. at 116.

In this case there is no testimony of mitigating circumstances arising from a troubled upbringing or of emotionally disturbed behavior. There is a statement by defense counsel to the court in the absence of the jury that Tokman's mother did not desire

to attend the trial because she had laryngitis and was involved in a divorce proceeding, thereby acknowledging some indifference to his plight, we suppose, but hardly sufficient to establish a disturbed and emotional background to mitigate the death sentence. Moreover Tokman was examined by competent medical authorities and was found to be without psychosis. As author of this opinion I find it deeply disturbing that the life of a youth should be taken in punishment for his crime, the justification for it being that it is the law of this state which dictates the result if due process is afforded. Our review and study of the record discloses no reversible error arising from either misapplication of the law or facts. Indeed it reveals that due proces a fair trial in all aspects was afforded the defendant.

As mentioned we have reviewed the record and compared the death sentence with all decisions of this Court beginning with Jackson v. State, 337 So. 2d 1242 (Miss. 1976), involving the death penalty. Most cases, 19, have been affirmed and few, 2, have been reversed. We conclude the death penalty for George David Tokman is not disproportionate, wanton or freakish when compared to other capital cases, their facts, these facts and the defendant. We are of the opinion from the evidence and the comparison, that the death penalty imposed by the jury is not excessive in relation to the aggravating and mitigating circumstances presented to it.

We also conclude the death sentence was not imposed because of the influence of passion, prejudice or any other arbitrary factor, and, the evidence supports the jury's finding of statutory aggravating circumstances in that the homicide was committed while the defendant was engaged in the crime of robbery, was for pecuniary gain, was for the purpose of avoiding lawful arrest, and was especially heinous, atrocious and cruel. The execution of Tokman will be consistent and even-handed when compared with all

post Jackson death penalty cases considered by this Court.[2]

The judgment of the lower court is affirmed and Wednesday, July 27, 1983, is set as the date for execution of the sentence and infliction of the death penalty in the manner provided by law.

AFFIRMED.

WALKER, P.J.; BROOM, P.J.; ROY NOBLE LEE; BOWLING; PRATHER; AND ROBERTSON, JJ., CONCUR. HAWKINS AND DAN LEE, JJ., DISSENT.

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[2] See Appendix "A".

APPENDIX "A"

DEATH CASES AFFIRMED BY THIS COURT:

Leatherwood v. State, (No. 53,914, decided May 25, 1983, but not yet reported).

Hill v. State, (No. 53,795, decided May 4, 1983, but not yet reported).

Pruett v. State, (No. 54,000, decided February 23, 1983, but not yet reported).

Gilliard v. State, 428 So. 2d 576 (Miss. 1983).

Evans v. State, 422 So. 2d 737 (Miss. 1982).

King v. State, 421 So. 2d 1009 (Miss. 1982).

Wheat v. State, 420 So. 2d 229 (Miss. 1982).

Smith v. State, 419 So. 2d 563 (Miss. 1982).

Edwards v. State, 413 So. 2d 1007 (Miss. 1982).

Johnson v. State, 416 So. 2d 383 (Miss. 1982).

Bullock v. State, 391 So. 2d 601 (Miss. 1980).

Reddix v. State, 381 So. 2d 999 (Miss. 1980).

Jones v. State, 381 So. 2d 983 (Miss. 1980).

Culberson v. State, 379 So. 2d 499 (Miss. 1979).

Gray v. State, 375 So. 2d 994 (Miss. 1979).

Jordan v. State, 365 So. 2d 1198 (Miss. 1978).

Voyles v. State, 362 So. 2d 1236 (Miss. 1978).

Irving v. State, 361 So. 2d 1360 (Miss. 1978).

Washington v. State, 361 So. 2d 61 (Miss. 1978).

Bell v. State, 360 So. 2d 1206 (Miss. 1978).

DEATH CASES REVERSED AS TO PUNISHMENT AND REMANDED FOR RESENTENCING TO LIFE IMPRISONMENT.

Edwards v. State, (No. 53,800, decided March 16, 1983, but not yet reported).

Coleman v. State, 378 So. 2d 640 (Miss. 1979).

IN THE SUPREME COURT OF MISSISSIPPI

NO. 53,676

GEORGE DAVID TOKMAN

v.

STATE OF MISSISSIPPI

HAWKINS, JUSTICE, DISSENTING:

I respectfully dissent, and would remand this case to the circuit court for a mandatory sentence of life imprisonment.

In the sentencing phase of this trial, after the state rested, the following developed in chambers:

BY MR. MOORE [counsel for defense]:

> Let the record show that, upon completion of the State's case, and a conference with David Tokman, that it has been decided not to place him on the witness stand for the reason that he would not assure his counsel or promise his counsel that he would not tell the jury that he would prefer the death penalty rather than serve time in Parchman. Is that correct, David?

BY THE DEFENDANT:

> Yes, sir.

BY MR. MOORE:

> Is there anything else you would like to add to that?

BY THE DEFENDANT:

> No, sir.

BY MR. TAYLOR [counsel for defendant]:

> We would also like for the record to reflect that Judge Moore and I have both conferred with David extensively in an effort to determine if there was anyone, including family members, that he knew of who would be able to give aid and

> assistance to him by testifying for him in the sentencing phase of this trial and we are of the conclusion that there are none. I would further like to state for the record that, prior to the beginning of the trial, David's mother was contacted in Dearborn, Michigan and asked to come to Jackson to testify for her son in the sentencing phase of this trial, if necessary. She declined on the grounds that she had laryngitis and was going through a divorce.

(R. 567-68).

While not revealed in this record, the record in the companion case of Leatherwood v. State, No. 53,914 (Miss. May 25, 1983), indicates that Tokman's military commanding officer at Fort Polk was aware Tokman had undergone psychiatric treatment. The nature or extent of this was never developed. (Leatherwood Record, pp. 669-70).

The absence of any evidence going to Tokman's rearing, training, or background is serious, in my view. Had the circuit judge, in the absence of a jury, been considering the penalty to be imposed in this case, it is inconceivable that he would not have required a pre-sentence investigation and report in which the entire background of Tokman would have been thoroughly explored. Indeed, Eddings v. Oklahoma, 455 U.S. 104 (1982), holds that the circuit judge may not ignore the background of an accused in a death penalty case.

From the record before us, we cannot know whether such non-disclosure was beneficial or harmful to Tokman. He was represented by able, intelligent counsel who may have had excellent reason for not offering any evidence on Tokman's background.

The record does reveal a mother whose absence of care or concern for her child was both unnatural and sickening. The Leatherwood record indicates some psychological problem in his background. Further, the record reveals the bravado Tokman showed before his associates coming apart at the seams in court chambers when his counsel informed the trial judge that the reason they did not put him on the witness stand was because

of the danger of his telling the jury he preferred the death penalty. Thus did the hater finally recognize the prime object of his hatred: himself.

Eddings contains some apt comment on youth:

> But youth is more than a chronological fact. It is a time and condition of life when a person may be most susceptible to influence and to psychological damage. Our history is replete with laws and judicial recognition that minors, especially in their earlier years, generally are less mature and responsible than adults. Particularly "during the formative years of childhood and adolescence, minors often lack the experience, perspective, and judgment" expected of adults.

Id. at 115-16 (footnotes and citation omitted).

Tokman was seventeen when he commited this crime. Because of his age, and what the record does reveal about his background, I would remand this case to the circuit court with directions to impose a sentence of life imprisonment. This generally is consistent with the statements I made in Leatherwood, which will not be repeated here.

DAN LEE, J., JOINS THIS DISSENT.

RELEVANT MISSISSIPPI STATUTE

§ 99-19-101. Jury to determine punishment in capital cases in separate sentencing proceeding; aggravating and mitigating circumstances to be considered.

(1) Upon conviction or adjudication of guilt of a defendant of capital murder or other capital offense, the court shall conduct a separate sentencing proceeding to determine whether the defendant should be sentenced to death or life imprisonment. The proceeding shall be conducted by the trial judge before the trial jury as soon as practicable. If, through impossibility or inability, the trial jury is unable to reconvene for a hearing on the issue of penalty, having determined the guilt of the accused, the trial judge may summon a jury to determine the issue of the imposition of the penalty. If the trial jury has been waived, or if the defendant pleaded guilty, the sentencing proceeding shall be conducted before a jury impaneled for that purpose. In the proceeding, evidence may be presented as to any matter that the court deems relevant to sentence, and shall include matters relating to any of the aggravating or mitigating circumstances. However, this subsection shall not be construed to authorize the introduction of any evidence secured in violation of the Constitutions of the United States or of the State of Mississippi. The state and the defendant and/or his counsel shall be permitted to present arguments for or against the sentence of death.

(2) After hearing all the evidence, the jury shall deliberate on the following matters:

(a) whether sufficient aggravating circumstances exist as enumerated in subsection (5) of this section;

(b) whether sufficient mitigating circumstances exist as enumerated in subsection (6) of this section, which outweigh the aggravating circumstances found to exist; and

(c) Based on these considerations, whether the defendant should be sentenced to life imprisonment or death.

(3) For the jury to impose a sentence of death, it must unanimously find in writing the following:

(a) That sufficient aggravating circumstances exist as enumerated in subsection (5) of this section; and

(b) That there are insufficient mitigating circumstances, as enumerated in subsection (6), to outweigh the aggravating circumstances.

In each case in which the jury imposes the death sentence, the determination of the jury shall be supported by specific written findings of fact based upon the circumstances in subsections (5)and (6) of this section and upon the records of the trial and the sentencing proceedings. If the jury does not make the findings requiring the death sentence, the court shall impose a sentence of life imprisonment.

(4) The judgment of conviction and sentence of death shall be subject to automatic review by the Supreme Court of Mississippi within sixty (60) days after certification by the sentencing court of entire record, unless the time is extended for an additional period by the supreme court for good cause shown. Such review by the supreme court shall have priority over all other cases and shall be heard in accordance with rules promulgated by the supreme court.

(5) Aggravating circumstances shall be limited to the following:

(a) The capital offense was committed by a person under sentence of imprisonment.

(b) The defendant was previously convicted of another capital offense or of a felony involving the use or threat of violence to the person.

(c) The defendant knowingly created a great risk of death to many persons.

(d) The capital offense was committed while the defendant was engaged, or was an accomplice, in the commission of, or an attempt to commit, or flight after committing or attempting to commit, any robbery, rape, arson, burglary, kidnapping, aircraft piracy or the unlawful use or detonation of a bomb or explosive device.

(e) The capital offense was committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody.

(f) The capital offense was committed for pecuniary gain.

(g) The capital offense was committed to disrupt or hinder the lawful exercise of any governmental function or the enforcement of laws.

KARR & LYONS
WASHINGTON, D.C. 20009
(202) 737-3844

(h) The capital offense was especially heinous, atrocious or cruel.

(6) Mitigating circumstances shall be the following:

(a) the defendant has no significant history of prior criminal activity.

(b) The offense was committed while the defendant was under the influence of extreme mental or emotional disturbance.

(c) The victim was a participant in the defendant's conduct or consented to the act.

(d) The defendant was an accomplice in the capital offense committed by another person and his participation was relatively minor.

(e) The defendant acted under extreme duress or under the substantial domination of another person.

(f) The capacity of the defendant to appreciate the criminality of his conduct or to confirm his conduct to the requirements of law was substantially impaired.

(g) The age of the defendant at the time of the crime.

83-6452

IN THE SUPREME COURT OF MISSISSIPPI

No. #53,676

WEDNESDAY, AUGUST 17, 1983, COURT SITTING : : : : : : : : :

GEORGE DAVID TOKMAN

vs.

STATE OF MISSISSIPPI

This cause this day came on to be heard on Petition for Rehearing and this Court having sufficiently examined and considered the same en banc and being of the opinion that the same should be denied doth order that said Petition be and the same is hereby denied.

ATTEST

A True Copy

This the 22nd day of Aug 1983

ROBERT L. WOMACK, CLERK

SUPREME COURT OF MISSISSIPPI

By [illegible]

MINUTE BOOK "BW", Page 417

83-6452

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1983

No. _____

GEORGE DAVID TOKMAN,

Petitioner,

v.

STATE OF MISSISSIPPI,

Respondent.

ORIGINAL

MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

The petitioner, George David Tokman, who is now held in the penitentiary of the State of Mississippi, moves for leave to file the attached Petition for a Writ of Certiorari to the Supreme Court of the State of Mississippi without prepayment of costs and to proceed in forma pauperis pursuant to Rule 46. Petitioner previously sought and was granted leave to proceed in forma pauperis in the Supreme Court of the State of Mississippi. The petitioner's affidavit in support of this motion is attached hereto.

Respectfully submitted,

John W. Karr
925 Washington Building
Washington, D.C. 20005
737-3544
Attorney for Petitioner

IN THE SUPREME COURT OF THE UNITED STATES OF AMERICA

GEORGE DAVID TOKMAN,
Petitioner

v.

THE STATE OF MISSISSIPPI,
Respondent

CA 84-_____

AFFIDAVIT IN SUPPORT OF MOTION TO PROCEED
ON APPEAL IN FORMA PAUPERIS

I, George David Tokman, being first duly sworn, depose and say that I am the petitioner in the above styled case; that in support of my motion to proceed on appeal without being required to prepay fees, costs or give security therefore, I state that because of my poverty I am unable to pay the costs of said proceeding or to give security therefore; that I believe I am entitled to redress; and that the issues which I desire to present on appeal are the following:

I further swear that the responses which I have made to the questions and instructions below relating to my ability to pay the cost of prosecuting the appeal are true.

1. Are you presently employed?

   a. NO

   b. I have been incarcerated under sentence of death since September 10, 1981, and have not been employed since before that time.

2. Have you received within the past twelve months any income from a business, profession or other form of self-employment, or in the form of rent payments, interest, dividends, or other source?

   a. NO

3. Do you own any cash or checking or savings account?

   a. NO

4. Do you own any real estate, stocks, bonds, notes, automobiles, or other valuable property (excluding ordinary household furnishings and clothing)?

a. NO

5. List the persons who are dependent upon you for support and state your relationship to those persons.

NONE

I understand that a false statement or answer to any questions in this affidavit will subject me to penalties for perjury.

George David Tokman
GEORGE DAVID TOKMAN

State of Mississippi
County of Sunflower

Subscribed and sworn to before me this 15 day of March, 1984.

Jeff L. Porter
NOTARY PUBLIC

My Commission Expires Jan. 23 1985

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1983

NO. 83-6452

GEORGE DAVID TOKMAN,
Petitioner

VERSUS

STATE OF MISSISSIPPI,
Respondent

ON PETITION FOR WRIT OF CERTIORARI TO
THE SUPREME COURT OF MISSISSIPPI

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

EDWIN LLOYD PITTMAN, ATTORNEY GENERAL
STATE OF MISSISSIPPI

WILLIAM S. BOYD, III
SPECIAL ASSISTANT ATTORNEY GENERAL
(COUNSEL OF RECORD)

MARVIN L. WHITE, JR.
SPECIAL ASSISTANT ATTORNEY GENERAL

OF COUNSEL

Post Office Box 220
Jackson, Mississippi 39205
Telephone: (601) 359-3680

ATTORNEYS FOR RESPONDENT

QUESTIONS PRESENTED

1. WHERE PETITIONER RAISES A CONSTITUTIONAL CLAIM CONCERNING HIS AGE AT THE TIME OF THE COMMISSION OF THE CRIME FOR THE FIRST TIME HERE CERTIORARI SHOULD BE DENIED.

2. WHERE THE JURY WAS INSTRUCTED THEY COULD CONSIDER THE FACT PETITIONER COMMITTED THE MURDER WHILE "ENGAGED IN THE COMMISSION OF A ROBBERY" AND THAT THE CAPITAL OFFENSE WAS COMMITTED FOR "PECUNIARY GAIN" THERE IS NO VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENTS, THEREFORE CERTIORARI SHOULD BE DENIED.

3. WHERE THE JURY THAT IMPOSED THE DEATH SENTENCE WAS INSTRUCTED THEY COULD CONSIDER WHETHER THE CAPITAL MURDER WAS "ESPECIALLY HENIOUS, ATROCIOUS OR CRUEL" WITHOUT FURTHER DEFINITION THERE WAS NO VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENTS AND CERTIORARI SHOULD BE DENIED.

4. WHERE A VENIREMAN WAS EXCLUDED AFTER INDICATING THAT HE HAD CONSCIENTIOUS SCRUPLES AGAINST THE DEATH PENALTY THERE WAS NO VIOLATION OF THE SIXTH AND FOURTEENTH AMENDMENTS AND CERTIROARI SHOULD BE DENIED.

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NO. 83-6452

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER 1983 TERM

GEORGE DAVID TOKMAN,
Petitioner

VERSUS

STATE OF MISSISSIPPI,
Respondent

PETITION FOR WRIT OF CERTIORARI TO THE
SUPREME COURT OF THE STATE OF MISSISSIPPI

BRIEF IN OPPOSITION

Respondent, State of Mississippi, respectfully prays that the Petition for Writ of Certiorari to the Supreme Court of Mississippi be denied in this case.

OPINION BELOW

The opinion of the Supreme Court of Mississippi is reported as Tokman v. State, 435 So.2d 664 (Miss. 1983). A copy of the opinion is before the Court as Appendix "A" to the Petition for Writ of Certiorari.

JURISDICTION

Petitioner seeks to invoke the jurisdiction of this Court by way of a Petition for Writ of Certiorari through the authority of 28 U.S.C. § 1257(3).

CONSTITUTIONAL PROVISIONS INVOKED

Petitioner seeks to invoke the provisions of the Constitution of the United States, Amendment VIII. This case also involves §§ 99-19-101 and 103, Miss. Code Ann. (Supp. 1982).

STATEMENT OF THE CASE

Petitioner, George David Tokman, was indicted for the crime of capital murder by the Grand Jury of the Circuit Court of Hinds County, Mississippi, First Judicial District, during the November 1980 Term. The indictment grew out of the August 24, 1980 slaying of Albert Taylor, by petitioner.

Petitioner was tried during the September 1981 Term of the Hinds County Circuit Court. His bifurcated trial was conducted under the procedures set forth in §§ 99-19-101 through 107, Miss. Code Ann. (Supp. 1982), and Jackson v. State, 337 So.2d 1242 (Miss. 1976). At the conclusion of the first stage of the bifurcated trial the jury retired to consider the issue of guilt. After deliberation the jury returned a verdict of capital murder. The trial then continued into the second or sentencing phase. After hearing additional testimony and hearing arguments of counsel the jury retired to consider sentence. After deliberation the jury returned a sentence of death in the proper form.

On automatic review to the Mississippi Supreme Court the conviction and sentence was affirmed on June 1, 1983. Rehearing was denied on August 17, 1983. Tokman v. State, 435 So.2d 664 (Miss. 1983).

After some confusion over the filing of this petition the Court finally allowed the petition to be docketed on March 22, 1984, although it was due on November 21, 1983. The Supreme Court after having reset the execution date for petitioner for April 4, 1984, stayed the execution pending consideration and disposition of this petition.

The facts as reflected by the record, show that on the evening of August 23, 1980 three (3) soldiers from Fort Polk, Louisiana on leave in Jackson, Mississippi put in motion a plan to rob a cab driver and kill him to secure money to return to their Louisiana army post. They were George David Tokman, the

petitioner, Michael Dale Leatherwood, and Jerry Fuson. Two (2) cabs were called. The first cab that responded was driven by a burly driver and they decided that he would be too much to handle. The second cab was driven by an old black man, Albert Taylor, so they decided to pick him as an easier prey.

After giving the driver an address, the plan was put into action: One (1) man looked for the money bag; another threw a rope around the driver's neck, choking him; and, George David Tokman stabbed him in the head with a knife.

The cab was driven to a parking lot behind a mall shopping area where the cab was searched. The murder-robbery netted $11.50 in change, a pistol, and a Gulf Oil credit card.

The three (3) men left Jackson stopping in Vicksburg, Mississippi where Tokman had some stitches placed in his hand which had been cut while stabbing Albert Taylor. The three (3) left Vicksburg and proceeded to Deritter Parish, Louisiana.

Several days later, while back at Fort Polk, Louisiana, Tokman bragged to two (2) other soldiers that he and his friends had robbed and killed a cab driver in Jackson, Mississippi. Tokman even had newspaper clippings of the Mississippi murder. One (1) of the soldiers who Tokman told, talked to his company commander and the Vernon Parish Sheriff's Department about what Tokman had revealed to him. Thethree (3) men were returned to Mississippi where they were indicted on charges of capital murder.

REASONS FOR DENYING THE WRIT

PETITIONER HAS PRESENTED NO FEDERAL QUESTION OF SUFFICIENT SUBSTANCE THAT WOULD WARRANT THE GRANTING OF THIS PETITION FOR WRIT OF CERTIORARI

1. WHERE PETITIONER RAISES A CONSTITUTIONAL CLAIM CONCERNING HIS AGE AT THE TIME OF THE COMMISSION OF THE CRIME FOR THE FIRST TIME HERE CERTIORARI SHOULD BE DENIED

On appeal petitioner raised a claim concerning his age in the context of the sentence being "contrary to the weight of the evidence" and being "disproportionally severe for the crime committed." The total discussion in his brief on appeal consists of two (2) paragraphs.

> At the time of Albert Taylor's murder, George David Tokman was seventeen year of age. At the time of his trial, he was eighteen. Had George David Tokman committed a minor felony at that age, he would have been eligible to be handled as a juvenile offender. The Record reveals that he had apparently never violated the laws of society until the night of Albert Taylor's murder. Then, for a reason or reasons unknown, a crime rampage then ensued, resulting in Albert Taylor's murder and the conviction of himself any his two co-defendants for armed robbery in the State of Louisiana. The argument is often heard that if a youth is old enough to kill, he is old enough to accept the adult consequences of the killing. Such as assertion does have a certain internal logic to it. But the fact remains that at the time of Albert Taylor's murder, George David Tokman was a child. The State of Mississippi should not be in the business of killing children.
>
> The Appellant's immaturity is nowhere better illustrated than in the sentencing phase of his trial. This was the most difficult case to defend in the memory of either of his

> two defense attorneys. The Appellant would not cooperate in the effort to save his life and would not consider any other course than to tell the jury that he wished to die if he were put on the witness stand. (AB-p.42). He may have felt that way at that time, but it is doubtful that he will feel that way at a later time. Experience with the death penalty has taught us that most suicide defendants eventually change their minds and decide that they want to live. The Appellant, at the time of his trial, was eighteen years of age. No eighteen-year-old, especially this one, really knows what he wants or will want in several years. It is urged that this Court give careful consideration and weight to the fact that the Appellant was only seventeen years old at the time of the killing. We submit that this mitigating factor standing alone is enough to make the death penalty inappropriate in this case.
>
> Appellant's Brief at 32-33.

Nowhere is petitioner's claim on direct appeal couched in constitutional terms. There was no case authority cited in support of this attack on the evidentiary sufficiency of the factors supporting the sentence.

The issue presented here was not raised in a federal constitutional context at trial or on appeal to the Mississippi Supreme Court. Under the rationale of Webb v. Webb, 451 U.S. 493 (1981) and Cardinale v. Louisiana, 394 U.S. 437 (1969), this Court lacks jurisdiction to decide an issue that has never been presented to the state courts or was not presented in a federal constitutional context to the state courts. As held in Webb, supra:

> It is a long-settled rule that the jurisdiction of this Court to re-examine the final judgment of a state court can arise only if the record as a whole shows either expressly or by clear implication that the federal claim was adequately presented in the state system. New York ex rel. Bryan v. Zimmerman, 278 U.S. 63, 67, 73 L.Ed. 184, 49 S.Ct.

61, 62 ALR 785 (1928); Oxley Stave Co. v. Butler County, 166 U.S. 648, 655, 41 L.Ed. 1149, 17 S.Ct. 709 (1897).

> It is appropriate to emphasize again, see Cardinale v. Louisiana, supra, at 439, 22 L.Ed.2d 398, 89 S.Ct. 1161, that there are powerful policy considerations underlying tne statutory requirement and our own rule that the federal challenge to a state statute or other official act be presented first to the state courts. These considerations strongly indicate that we should apply this general principle with sufficient rigor to make reasonably certain that we entertain cases from state courts only where the record clearly shows that the federal issue has been properly raised below. (Emphasis added)

68 L.Ed.2d at 398.

Even if he had properly raised this issue below and could invoke the jurisdiction of this Court the issue is not worthy of the granting of certiorari.

This Court stated in Eddings v. Oklahoma, 455 U.S. 104, 102 S.Ct. 869, 71 L.Ed.2d 1 (1982):

> All of this does not suggest an absence of responsibility for the crime of murder, deliberately committed in this case. Rather, it is to say that just as the chronological age of a minor is itself a relevant mitigating factor of great weight, so must the background and mental and emotional development of a youthful defendant be duly considered in sentencing. 455 U.S. at 116, 102 S.Ct. at 877.

The court below adopted this language in its opinion in Tokman, supra, at 672. The issue of petitioner's age being a mitigating factor was fully considered by the jury as is clear from the record and the opinion below. The court below has further spoken on this same issue in the recent case of Attina Marie Cannaday v. State of Mississippi, No. 54,982 (decided May 16, 1984, not yet reported) [copy attached as Appendix "A"]. In

Cannaday the court below stated, in answer to a properly raised Eighth and Fourteenth Amendment claim:

> The United States Supreme Court granted certiorari on this issue, See Eddings v. Oklahoma, 450 U.S. 1040, 101 S.Ct. 1756, 68 L.Ed.2d 237 (1981). However, the high court reversed Eddings on an alternative ground and did not address the age issue. See Eddings v. Oklahoma, 455 U.S. 104, 122, 71 L.Ed.2d 1, 14 (1982).
>
> In light of the Supreme Court's silence on this issue, the problem of when a juvenile can be punished the same as an adult remains with the Legislature. The law in Mississippi specifically Mississippi Code Annotated section 43-21-151 (1972) provides that: "No child who has not reached his thirteenth birthday shall be held criminally responsible or criminally prosecuted for a misdemeanor or a felony. . . ." Inferentially one who has reached his or her thirteenth birthday, may in certain cases be tried as an adult. Mississippi Code Annotated section 43-21-137 (1972). This necessarily implies that the juvenile in these cases could be punished the same as an adult.
>
> The capital murder statutes in this state include as age a mitigating factor to be considered. Mississippi Code Annotated section 99-19-101(6)(g) (1972) (1983 Supp.). See also, Tokman v. State, 433 So.2d 664 (Miss. 1983). In the case sub judice age was considered along with other mitigating circumstances supported by the evidence. With this in mind, the jury returned the sentence of death. Even though we grant Cannaday a new trial on the sentence phase, her age at the time of the crime remains a mitigating factor to be considered by the jury. Her age by itself is not grounds for reversal.
>
> Slip at 22-23.

The court below has relied upon this Court's direction in this matter. This is an issue best left to the discretion of the legislatures of the various states and the jurys that see and hear the actual trials. To create a per se rule would not be

wise at this or any other time even if this Court had jurisdiction to consider this matter.

2. WHERE THE JURY WAS INSTRUCTED THEY COULD CONSIDER THE FACT PETITIONER COMMITTED THE MURDER WHILE "ENGAGED IN THE COMMISSION OF A ROBBERY" AND THAT THE CAPITAL OFFENSE WAS COMMITTED FOR "PECUNIARY GAIN" THERE IS NO VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENTS, THEREFORE CERTIORARI SHOULD BE DENIED

Respondent would show the jury herein found the following four (4) aggravating circumstances:

> "We, the Jury, find unanimously and beyond a reasonable doubt the following aggravating circumstances:
>
> (1) The Capital Murder was committed while the defendant was engaed in the commission of robbery;
>
> (2) The Capital Murder was committed for pecuniary gain;
>
> (3) The Capital Murder was especially heinous, atrocious or cruel;
>
> (4) The Capital Murder was for the purpose of avoiding a lawful arrest."

Miss. Code Ann., § 99-19-101(2), poses three (3) succinct inquires to be answered by the sentencing jury. The applicable portions of this section are quoted as follows:

> (2) After hearing all the evidence, the jury shall deliberate on the following matters:
>
> (a) Whether sufficient aggravating circumstances exist as enumerated in subsection (5) of this section;
>
> (b) Whether sufficient mitigating circumstances exist as enumerated in subsection (6) of this section, which outweigh the aggravating circumstances found to exist; and

> tions, whether the defendant should be sentenced to life imprisonment or death.
>
> (Section 99-19-101(2)(a)(b)(c)).

The jury may not go to inquiry number two [subsection (b)] unless and until inquiry number one [subsection (a)] is answered affirmatively. If inquiries number one and two are both answered "yes", the jury may yet impose a sentence of life imprisonment if it elects to do so. And the latter statement is true even if the sole basis for the jury's imposition of the lesser sentence is simply that it likes the defendant's looks.

The penalty of death, however, may not be imposed until at least one (1) of the statutory aggravating circumstances enumerated in 99-19-101 is unanimously found beyond a reasonable doubt [the applicable standard] and until it also finds unanimously that the are insufficient mitigating circumstances. Section 99-19-103 is very clear on this point. It reads:

> The statutory instructions as determined by the trial judge to be warranted by the evidence shall be given in the charge and in writing to the jury for its deliberation. The jury, if its verdict be a unanimous recommendation of death, shall designate in writing, signed by the foreman of the jury, the statutory aggravating circumstance or circumstances which it unanimously found beyond a reasonable doubt. Unless at least one (1) of the statutory aggravating circumstances enumerated in section 99-19-101 is so found or if it is found that any such aggravating circumstance is overcome by the finding of one or more mitigating circumstances, the death penalty shall not be imposed. If the jury cannot, within a reasonable time, agree as to punishment, the judge shall dismiss the jury and impose a sentence of imprisonment for life. (emphasis supplied)

The focal point of the jury's initial (1st) inquiry at the conclusion of the sentencing phase is whether or not any aggravating circumstances are present. This is true because at least one of the statutory aggravating circumstances enumerated in

99-19-101 must be found to exist beyond a reasonable doubt before the jury is authorized to even consider imposing the penalty of death.

There is no presumption implicit in our statutory scheme that a mere conviction of a substantive capital felony, e.g., robbery-murder, automatically and standing alone compels a finding of death unless the defendant adduces evidence in mitigation. Nothing in our statute says that a jury must impose the penalty of death in a factual sentencing environment where one or more aggravating factors are unanimously and beyond a reasonable doubt found to exist and no mitigating circumstances are forthcoming.

It may be that there is something about the appearance, age, attitude, and demeanor of the defendant that impresses the sentencing jury and convinces its members that the accused does not deserve to die. Or some particular mitigating aspect of the defendant's life history or the particular circumstances surrounding the offense may have been injected at trial during all the guilt phase. A jury, during the second phase, might well consider each of these factors in reaching its verdict although such are not specifically placed before it during the sentencing phase by defense counsel or instruction of the court below.

In other words, even in the complete absence of mitigating factors, a sentencing jury is not compelled legislatively to return a sentence of death no matter how many aggravating factors it has before it. Our statutory scheme is primarily designed and intended to inform the State what it must prove to grant to the sentencing jury the power to consider the imposition of the sentence of death and not what the defendant must do to show to the sentencer why his life should be spared. It devolves upon the defendant, once the State has met its burden, to move forward with whatever evidence in mitigation he may muster. This is not unlike the necessity at a trial for noncapital homicide of showing that one acted justifiably upon sufficient provocation or establishing that the homicide was excusable by virtue of accident or misfortune.

A defendant enters a criminal trial shielded by a presumption of innocence and, as we see it, he enters the sentencing phase of a death penalty case clothed with a so-called presumption of life. Each, however, is rebuttable and may be overcome by a quantum of proof. It does not follow that because a defendant in petitioner's posture enters the sentencing phase of a bifurcated trial for felony-murder with one strike against him, that he is predestined to "strike-out" in the batter's box.

Is not the killing of another while one is engaged in the commission of the crimes of robbery, rape, burglary, arson, kidnapping, aircraft piracy, or the unlawful use or detonation of a bomb or explosive devise [SEE: § 99-19-101(5)(d)], a circumstance of the offense and a patently aggravating one at that? Many states, and Mississippi is one of them, have a so-called felony-murder statute. [SEE: § 97-3-19(2)(e) (Supp. 1978)] The maximum punishment, pursuant to conviction for such an offense, is harsh because of the chronically severe and aggravated nature of the offense. There is nothing in the Federal or our State Constitution that prohibits a state legislature from enacting a law that prescribes as an aggravating circumstance for the sentencer's consideration in a death penalty case a homicide perpetrated in a so-called felony-murder factual environment.

In Mississippi the punishment of death is not mandatorily imposed upon the mere conviction of a capital felony-murder. Nothing compels the jury to impose the sentence of death upon its finding of one or more statutory aggravating circumstances regardless of the stage of the proceedings that they may come to light. The finding of one or more statutory aggravating circumstances simply <u>authorizes</u> the jury to <u>consider</u> the imposition of death.

The Fifth Circuit Court of Appeals recently addressed the same argument in Henry v. Wainwright, 721 F.2d 990 (1983). Therein the Court held in part:

> Henry next contends that various constitutional deficiencies in his sentencing proceedings rendered that proceeding unreliable, standardless, and arbitrary. See generally Godfrey v. Georgia, 446 U.S. 420, 100 S.Ct. 1759, 64 L.Ed.2d 398 (1980). First, Henry argues that reliance by the trial judge on the § (5)(d) aggravating circumstance, murder while committing robbery, resulted in the automatic imposition of the death penalty in his case. This argument has no merit. The sentencing authority clearly has discretion in deciding whether to impose the death penalty. See Barclay, 103 S.Ct. at 3431 (Stevens, J., concurring). It is certainly not unconstitutional for the State of Florida, in constructing a death sentencing procedure, to consider murders committed in the course of other dangerous felonies to be reprehensible. Nor, as Henry argues, does the use of the underlying felony shift the burden of proof to the defendant: the state must nevertheless prove the existence of aggravating circumstances. The Supreme Court has held the Florida statute constitutional. See Proffitt v. Florida, 428 U.S. 242, 96 S.Ct. 2960, 49 L.Ed.2d 913 (1976). Henry raises no argument here that convinces us that this case is not controlled by Proffitt.
>
> Second, Henry argues that the trial judge improperly regarded the aggravating circumstances of murder in the commission of a robbery and murder for pecuniary gain as separate and distinct aggravating circumstances in violation of Provence v. State, 337 So.2d 783 (Fla. 1976), cert. denied, 431 U.S. 969, 97 S.Ct. 2929, 53 L.Ed.2d 1065 (1977). Henry's reading of Provence is correct as a matter of state law. We believe, however, that the decision of the Supreme Court in Barclay, ____ U.S. ____, 103 S.Ct. 3418, 77 L.Ed.2d 1134 (1983), controls our resolution of this issue for the reasons set forth in section I, supra. The trial judge found no mitigating circumstances, and we cannot conclude that the state-law error by the trial judge raised the possibility that the death sentence in this case was not "imposed in a consistent rational manner." Id., 103 S.Ct. at 3429 (Stevens, J., concurring). The record gives no indication

that the sentencing judge considered it important that the same facts supported two statutory provisions. We therefore reject Henry's claim on this ground.

Petitioner's argument is without merit and not persuasive.

3. WHERE THE JURY THAT IMPOSED THE DEATH SENTENCE WAS INSTRUCTED THEY COULD CONSIDER WHETHER THE CAPITAL MURDER WAS "ESPECIALLY HENIOUS, ATROCIOUS OR CRUEL" WITHOUT FURTHER DEFINITION THERE WAS NO VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENTS AND CERTIORARI SHOULD BE DENIED

We must note that in addition to finding that the capital murder here was committed in an "especially henious, atrocious or cruel" manner beyond a reasonable doubt the jury also found that three (3) other aggravating circumstances existed by the same standard. These other aggravating factors found were:

1. The capital murder was committed while the defendant was engaged in the commission of robbery.

2. The capital murder was for pecuniary gain.

3. The capital murder was for the purpose of avoiding a lawful arrest.

The finding of any one (1) of these is sufficient for the imposition of the death penalty under Mississippi law if the jury finds it outweighs the mitigating circumstances even if one is found invalid. Zant v. Stephens, ____ U.S. ____, 103 S.Ct. ____, 77 L.Ed.2d 235 (1983).

Petitioner's reliance on Edwards v. State, 441 So.2d 81 (Miss. 1983) is misplaced as it is a dissent he relies on. The Supreme Court of Mississippi holds steady with its ruling that the instruction given here is sufficient. See: Edwards, supra, at 90-92.

The answer to the question in a federal context comes from Gray v. Lucas, 677 F.2d 1986, rehearing den., 685 F.2d 139 (5th Cir. 1982), cert. denied, Gray v. Lucas, ____ U.S. ____, 51

U.S.L.W. 3774, reh. den., ____ U.S. ____, 51 U.S.L.W. 3883 (1983)

Court of Appeals stated:

> Gray claims that the fourth aggravating factor, that the murder is especially heinous, atrocious or cruel has never been construced by the state supreme court. This claim, however, is incorrect. See Coleman v. State, 378 So.2d 640, 648 (1978).
>
> Gray also claims that this factor has been inconsistently applied and contracts Irving v. State, 361 So.2d 1360 (Miss. 1978), cert. denied, 441 U.S. 913, 99 S.Ct. 2014, 60 L.Ed.2d 386 (1979), with Volyes v. State, 362 So.2d 1235 (Miss. 1978), cert. denied, 441 U.S. at 956, 99 S.Ct. 2184, 60 L.Ed.2d 1059 (1979). On its face, Gray's argument apppears meritorious since Voyles involved a particularly gruesome murder and Irving involved the killing of a victim by a single shotgun blast. The difficulty with Gray's argument, however, is that Irving, as it is presented by the state supreme court, did not rely on the fact that the murder was especially heinous, atrocious or cruel. The two aggravating circumstances which the court noted were that Irving had committed the murder during the course of a robbery and that he had a prior criminal record. See 361 So.2d at 1371, 1372. The factual basis of Gray's argument is thus incorrect.
>
> Moreover, we note that the state supreme court has consistently applied this factor to pitiless crimes which are unnecessarily torturous to the victim. See Reddix v. State, 381 So.2d 999 (Miss.) (elderly man beaten to death with iron wrench), cert. denied, 449 U.S. 986, 101 S.Ct. 408, 66 L.Ed.2d 251 (1980); Jones v. State, 381 So.2d 983 (Miss.) (same), cert. denied, 449 U.S. 1003, 101 S.Ct. 543, 66 L.Ed.2d 300 (1980); Culberson v. State, 379 So.2d 499 (Miss. 1979) (man knocked to ground with stick and shot while begging for mercy), cert. denied, 449 U.S. 986, 101 S.Ct. 406, 66 L.Ed.2d 250 (1980); Voyles v. State, 362 So.2d 1236 (Miss. 1978) (woman beaten, run over twice with car and thrown in creek). The only arguable exception to the consistent application of this factor has been Washington v. State, 361 So.2d 61 (Miss. 1978), cert. denied, 441 U.S. 916, 99 S.Ct. 2016, 60 L.Ed.2d 388 (1979). In Washington the defendant robbed a convenience store

> and shot the clerk while leaving the store. Although the murder was cold blooded, it was arguably not a "pitiless crime which is unnecessarily torturous to the victim." See Coleman v. State, 378 So.2d at 648. We note that Washington was the first case to apply this factor and was decided before Godfrey v. Georgia, supra. Even if Washington construed this term too broadly, there is every indication that the state supreme court has refined its views, applied this term consistently since ten, and will continue to do so. See Coleman v. State, 378 So.2d at 650 (invalidating death penalty because penalty was disproportionate to that imposed in similar cases).
>
> 667 F.2d at 1110-1111.

On petition for rehearing the Court elaborated further saying:

> Miss. Code Ann. § 99-19-101(5)(h) provides that one aggravating circumstance to be considered by a jury in the sentencing phase of a capital murder trial is whether the murder was especially heinous, atrocious, or cruel. Gray contends that the Mississippi Supreme Court has never adopted a constitutionally permissible construction of that statute.
>
> Again, we disagree. In Coleman v. State, 378 So.2d 640 (Miss. 1978), the Mississippi Supreme Court construed § 99-19-101(5)(h) by quoting from this court's opinion in Spinkellink v. Wainwright, 578 F.2d 582, 611 (5th Cir. 1978): "What is intended to be included are those capital crimes where the actual commission of the capital felony was accompanied by such additional acts as to set the crime apart from the norm of capotal felonies - the conscienceless or pitiless crime which is unnecessarily torturous to the victim." 378 So.2d at 648 (emphasis added by the state court). This construction clearly eliminates the risk that the death penalty will be inflicted in an arbitrary and capricious manner. See Furman v. Georgia, 408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed.2d 346 (1972).
>
> 685 F.2d at 141.

This Court has been presented this question numerous times with the result being that certiorari has been denied each time. See: Gray, supra. There is still no indication that the court below is giving this circumstance an overbroad inter-

pretation. The crime here fits the criteria perfectly, an elderly man set upon by three (3) young men. One of the attackers, Leatherwood, threw a rope around Taylor's neck and jerked him halfway over into the backseat and held the rope around Taylor's neck for several minutes while petitioner stabbed Taylor in the head. This factual situation cannot be said not to fit the criteria of "especially henious, atrocious or cruel" under any definition and certainly the restrictive one used by the court below. There being no federal constitutional violation certiorari should be denied.

4. WHERE A VENIREMAN WAS EXCLUDED AFTER INDICATING THAT HE HAD CONSCIENTIOUS SCRUPLES AGAINST THE DEATH PENALTY THERE WAS NO VIOLATION OF THE SIXTH AND FOURTEENTH AMENDMENTS AND CERTIORARI SHOULD BE DENIED

Petitioner finally asserts the claim that a prospective juror, Dewitt Jordan, was improperly excused in violation of Witherspoon v. Illinois, 391 U.S. 510 (1968). When the totality of the questioning of Jordan on voir dire is considered it is clear that he was properly excluded.

Looking to the record we find the following colloquy:

BY MR. PETERS:

Okay, sir?

BY A JUROR:

I feel the same way and I'm Dewitt Jordan.

BY MR. PETERS:

You feel -- you are gonna tell us first of all that you are opposed to the death penalty. Is that right, Mr. Jordan?

BY MR. JORDAN:

Sir?

BY MR. PETERS:

Are you saying that or not?

BY MR. JORDAN:

I didn't understand.

BY MR. PETERS:

Is your statement -- well, first of all, are you against the death -- do you have conscientious scruples against the death penalty?

BY MR. JORDAN:

Yes.

BY MR. PETERS:

All right. So, you are definitely against the death penalty. There's no question about that.

MR. JORDAN:

Right.

BY MR. MOORE:

May it please the Court, I think the question should be completed in any given case. I object to the form of the question.

BY THE COURT:

Do you intend to challenge him?

BY MR. PETERS:

Sir?

BY THE COURT:

If you intend to challenge him, I believe you need to ask him in the proper form.

BY MR. PETERS:

Yes, sir. I don't think that I can ask it. I had rather the Court ask those questions when I get through. Thank you, Your Honor.

BY THE COURT:

All right. Go ahead.

BY MR. PETERS:

The second question is, in view of the fact that you are against the death penalty, could you play a part in the trial of an individual that could result in the death penalty?

(No reponse)

BY MR. PETERS:

That is, could you vote guilty knowing that it could result in the death penalty?

BY MR. JORDAN:

I don't think so.

BY MR. PETERS:

You could not do that.

BY MR. JORDAN:

No.

BY MR. PETERS:

Okay. You could not vote guilty knowing it could result in the death penalty. Is that correct?

BY MR. JORDAN:

Yes, sir.

BY MR. PETERS:

Is there anyone else now that feels that way?

(No response)

BY MR. PETERS:

May it please the Court, I would challenge Mr. Jordan also for cause and I would ask the Court to question these jurors who have expressed their opinion.

BY THE COURT:

All right.

Tr. 96-98.

It is clear that Jordan was unequivocal in his opposition to the death penalty.

When the trial court questioned Jordan as to whether he could vote for a guilty verdict knowing that he would then have

to consider the death penalty in the second phase of the trial the following exchange insued:

BY THE COURT:

Mr. Jordan, did you understand the question?

BY MR. JORDAN:

Yes, sir.

BY THE COURT:

And what is your answer?

BY MR JORDAN:

Well, knowing that it might be the death - I don't know.

BY THE COURT:

Well, let me let you think about it and I'll come back to you and I'll go on to the others. Ms. Lucas?

Tr. 103

When the court came back to Jordan the following responses were given:

BY THE COURT:

Mr. Jordan, have you had time to consider it?

BY MR. JORDAN:

I don't think I could because of the age.

BY THE COURT:

Because of the age?

BY MR. JORDAN:

Yes, sir.

BY THE COURT:

Well, of course, we are not talking about this particular case. We are talking about in any case.

(No response)

BY THE COURT:

Do you still need more time to think about it?

BY MR. JORDAN:

I don't think I could.

BY THE COURT:

You don't think you could?

BY MR. JORDAN:

No, sir.

BY THE COURT:

You don't think you could vote guilty is what I am getting at.

BY MR. JORDAN:

No, sir.

BY THE COURT:

Any further questions, Mr. Peters?

BY MR. PETERS:

No, sir, Your Honor.

Tr. 105.

Finally defense counsel attempted to rehabilitate Jordan. The following colloquy is found:

BY MR. MOORE:

I forgot about Mr. Jordan having some reservation. Mr. Jordan, with respect to the death penalty, you understand that, if you serve on the jury and find the Defendant guilty, you go into the sewcond phase but it does not necessarily mean under the law that you have to give him the death penalty. You understand that, don't you?

BY MR. JORDAN:

Yes, sir.

BY MR. MOORE:

Now, you had indicated that it would be difficult for you or you didn't think you could or whatever but I'll ask you whether or not in your mind there is no case, no matter what type the crime or how vicious or whatever it is, you could not vote for the death penalty.

(No response)

BY MR. MOORE:

Think about it if you will. Not this case but any case.

BY MR. JORDAN:

It might depend.

BY MR. MOORE:

Pardon me?

BY MR. JORDAN:

It might depend.

BY MR. MOORE:

It might depend?

BY MR. JORDAN:

Yes.

BY MR. MOORE:

So there is the possibility that you could vote for the death penalty in a case if the facts warranted in your mind the crime was heinous enough or bad enough.

BY MR. JORDAN:

Yes, sir.

BY MR. MOORE:

That's all. Thank you.

R. 246-247.

The only conclusion from the record ius that Jordan stated that he could not give the death penalty in this case. First, because he did not believe in the death penalty and second, that he could not impose it on one of petitioner's youth. Petitioner's attempt to rehabititate Jordan failed. In the en banc decision of Williams v. Maggio, 679 F.2d 381 (5th Cir. 1982); cert. den., ____ U.S. ____, 51 U.S.L.W. 3920 (June 27, 1983); reh. den., ____ U.S. ____, 52 U.S.L.W. 3187 (September 8, 1983), the Court of Appeals speaking to an almost identical factual situation held:

Petitioner charges that Ms. Brou's responses fall far short of demonstrating automatic opposition to the death penalty. He attributes the absence of Witherspoon talismanic responses on the record to the State's failure to propound hard questions about opposition to the death penalty. We disagree. If one examines the underscored portion of her statement, one clearly finds that she did state that she could not return a death sentence. When the prosecutor inquired again to insure that she could not consider this penalty, Ms. Brou responded that she did not think she could do it. When this response is viewed in conjunction with her previous statement of clear opposition to the death penalty, the record of automatic opposition to the death penalty is established.

Witherspoon and its progeny do not mandate that a prospective juror aver that she would refuse to consider the death penalty in every case that could possible arise. If she knows enough about the case to know that she could not consider imposition of the death penalty regardless of what evidence might be presented, she must be excused. Ms. Brou's responses demonstrate that she would be unwilling to consider the death penalty where the crime charged was murder committed during a robbery. She does not leave open the possibility that she would consider this penalty in a more "hideous" case. Her unwillingness to do so here, however, is firm.

By means to this appeal, petitioner asks this Court to narrow further the stiff requirements of Witherspoon and its progeny and, in this Court's opinion, thereby infringes the State's right to an impartial jury that is willing to consider all penalties provided by law. According to petitioner's analysis, exclusion of a venireman is impermissible unless he states in response to all questions that he absolutely refuses to consider the death penalty. An equivalent response framed in any other reasonable manner is judged to demonstrate that the individual's position is not firm. We reject such a rigid, unthinking interpretation of Witherspoon. Form will not be placed over substance.

679 F.2d at 384-85.

The dictates of Witherspoon, supra, as amplified by Adams v. Texas, 448 U.S. 38 (1980) and Williams, supra, were fully followed. The juror stated he could not impose the death penalty in this case because of the defendant's age. Asking him if he could give the death penalty in some hypothetical case does not rehabilitate him. There being no violation of the doctrine set forth in Witherspoon, supra, certiorari should be denied.

CONCLUSION

For the above stated reasons the petition for writ of certiroari should be denied.

Respectfully submitted,

EDWIN LLOYD PITTMAN, ATTORNEY GENERAL
STATE OF MISSISSIPPI

WILLIAM S. BOYD, III
SPECIAL ASSISTANT ATTORNEY GENERAL

MARVIN L. WHITE, JR.
SPECIAL ASSISTANT ATTORNEY GENERAL

BY: Marvin L. White, Jr.
MARVIN L. WHITE, JR.

Office of the Attorney General
Post Office Box 220
Jackson, Mississippi 39205
Telephone: (601) 359-3680

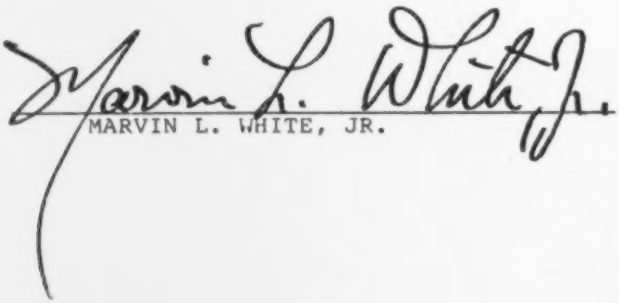
CERTIFICATE OF SERVICE

I, Marvin L. White, Jr., a Special Assistant Attorney General for the State of Mississippi, do hereby certify that I have this day caused to be mailed, via United States Postal Service, first-class postage prepaid, a true and correct copy of the foregoing Brief in Opposition to Petition for Writ of Certiorari to the following:

John W. Karr, Esquire
Attorney at Law
625 Washington Building
Washington, D. C. 20005

Attorney for Petitioner

This, the 22nd day of May, 1984.



MARVIN L. WHITE, JR.

IN THE SUPREME COURT OF MISSISSIPPI

NO. 54,982

ATTINA MARIE CANNADAY

v.

STATE OF MISSISSIPPI

EN BANC

PRATHER, JUSTICE, FOR THE COURT:

This capital murder conviction presents for review two questions. The first is whether Attina Marie Cannaday's constitutional right to counsel at the time incriminating statements were obtained from her while in custody in the county jail was violated. The second question is, if her constitutional rights were violated, whether such violation requires reversal for the guilt and sentence phase of her conviction.

Attina Marie Cannaday, a sixteen year old divorcee, was convicted in Harrison County Circuit Court of the kidnap and murder of Air Force Sergeant Ronald Wojcik and was sentenced to death by the jury. Cannaday appeals asserting that the trial court committed errors as follows:

(1) In excluding prospective jurors in violation of the principles set forth in Witherspoon v. Illinois, 391 U.S. 510, 88 S.Ct. 1770, 20 L.Ed.2d 776 (1968) (1968);

(2) In restricting cross-examiantion as to the probationary status of the state's primary witness;

(3) In prohibiting relevant expert psychiatric testimony offered on behalf of appellant;

(4) In allowing incriminating statements of appellant elicited from her in violation of her rights guaranteed under

Appendix A

Fifth and Sixth Amendments to the United States Constitution of right to counsel; and

(5) In failing to instruct the jury on lesser included offense of kidnapping violated appellant's rights to due process under the Fifth, Eighth and Fourteenth Amendments to the United States Constitution.

Additional errors from the sentence phase of the bifurcated trial assigned are:

(6) The death sentence in this case is unconstitutional because it was the result of an improperly and inadequately instructed jury.

(7) The imposition of the death penalty on a sixteen year old child at the time of the crime constitutes cruel and unusual punishment under the Eighth and Fourteenth Amendments.

(8) The execution of Attina Cannaday, in view of overwhelming mitigating circumstances, would be disproportionate under Mississippi law and the Eighth Amendment.

After conviction and perfection of an appeal to this Court, Cannaday filed a petition for writ of error coram nobis in the Harrison County Circuit Court. Upon conclusion of the hearing, the circuit judge concluded that the circuit court was without jurisdiction to entertain the petition for writ of error coram nobis pending appeal of the initial conviction to this Court. The denial of the writ of error coram nobis is also on appeal here for the trial court's failure to vacate the death sentence when the sentence was based on alleged perjurious, and subsequently recanted testimony, of the state's primary witness, the co-indictee in this crime.

I.

FACTS

In the early hours of June 3, 1982, twenty-six year old Ronald Wojcik was the victim of kidnapping and murder. His

girlfriend, Sandra Sowash, was kidnapped with him and raped. The three principals were the defendant Attina Marie Cannaday, her friend David Gray, and another, Dawn Bushart.

Ms. Cannaday was an Alabama runnaway child from a broken home at age thirteen who married and divorced at age fourteen. She worked in numerous bars in Gulfport and Biloxi as dancer and barmaid and supplemented her income by prostitution. Cannaday met Wojcik at the Sports Page Bar where he "moon-lighted" after his duties at Keesler Air Force Base.

Wojcik was divorced from his wife, but frequently kept his two children of his marriage. Cannaday began living with Wojcik, and they ostensibly conducted themselves as a married couple for several weeks until he learned her true age. Realizing that the military disapproved of this relationship, Wojcik required Cannaday to move. Shortly afterwards Wojcik found a new girlfriend, Sandra Sowash.

On May 22, 1982, Cannaday met with a man named John Cooper, who was an acquaintance of Wojcik. Cannaday told Cooper that she had caught Wojcik and Sowash in bed together and had threatened to kill Wojcik if she caught them again. Cannaday denied the threat, but admitted discussing the situation with Cooper. Cooper advised Wojcik of the threats, but he seemed not to be bothered. Wojcik did tell Cooper that on the night before (May 21) Cannaday showed up outside his apartment, yelling obscenities.

On June 1, 1982, Cannaday made a phone call to a friend, Gena Pecoul. During that conversation she expressed her love for Wojcik, but also expressed a desire to kill him.

Cannaday lived at several locations after her removal from Wojcik's apartment. She became a friend with David Gray, an unemployed young man who lived out of his automobile.

They discussed Cannaday's feelings for Wojcik and her dislike for Sowash.

On the night of June 2, the date preceding this crime, Cannaday was at the Red Garter Lounge at the Buena Vista Hotel. She and David Gray drank and danced. Both were fairly intoxicated, and Gray had smoked some marijuana. Also at the lounge was Dawn Bushart, a girl Cannaday referred to as "the ugly fat girl." Her name was not known until after the crime. Bushart joined Cannaday and Gray. As the lounge was closing, Cannaday asked Gray if he would go with her to her "old man's apartment with her to get her van and some clothes." Gray's story was that Cannaday wanted him to beat Wojcik to scare him and further to kill Wojcik, to which he refused. Cannaday denied this and denied asking Gray if he had a gun. Gray did not have a gun, but took four knives from his car, as Cannaday put it, "in case we got picked up by a nut." Since Gray's car was not operative, the three - - Cannaday, Gray and Bushart, hitchhiked westward. Someone picked them up and took them to a point near Wojcik's apartment.

Seeing Wojcik's white van, Cannaday knew he was home. They approached the apartment, and Gray gave Bushart a knife and gave Cannaday a black handled knife. Gray kept a butcher knife and a fourth knife which was strapped to his belt. Gray ordered Bushart to stand out on the front porch.

Cannaday and Gray entered the apartment. The testimony was disputed as to whether the door was unlocked or whether Cannaday had a key. Cannaday gave her knife to Gray and entered Wojcik's bedroom while Gray remained in the living room. Wojcik and Sandra Sowash were asleep in bed as Cannaday entered.

The scene that transpired at the apartment was destructive and forceful. The encounter ended with Wojcik

and Sowash being forced at knifepoint to get in Wojcik's van. Wojcik's two children who were asleep in the other bedroom were left behind. As they were leaving the apartment, Cannaday picked up a wallet belonging to Wojcik. The first time that Bushart was seen by either of the victims was when they stepped outside to get into the van.

With Cannaday driving, they proceeded westward along U. S. 90 at a pretty fast rate of speed. After making a right turn off of U. S. 90, Cannaday attempted to race an approaching train, but moments before getting to the tracks, Wojcik grabbed the wheel and prevented the collision with the train. Gray told Bushart that if Wojcik moved again to cut him.

Both Gray and Sowash stated that Cannaday suggested that Gray have sex with Sowash. Gray forced Sowash to have sexual relations with him while Cannaday continued to drive.[1]

After making several turns, Cannaday decided to stop on a gravel road known as Lampkin Road, somewhere north of Biloxi. Gray got out of the van and forced Wojcik out. Wojcik urged Cannaday to discuss the situation with him, but Cannaday refused. Gray had the butcher knife and another knife strapped to his belt. There was a conflict as to who had the black handle knife, Sowash saying that Cannaday had it, and Cannaday saying that Bushart had it.

Gray forced Wojcik into the woods; this was the last time Wojcik was seen alive.

At this point, the facts are in sharp dispute. David Gray's testimony denied any stabbing of Wojcik. His version

---

[1] Gray was granted immunity from prosecution on the rape charge in exchange for his testimony concerning the rape.

of the events was that after entering the woods, Gray was distracted by Cannaday who had shouted his name. Wojcik took this opportunity to hit Gray, and a fight occurred. Gray over-powered Wojcik, but had dropped the knife during the fight. After hitting Wojcik until he was nearly unconscious, Gray began looking for his knife. As he was looking, Cannaday walked up and advised him that Sowash had run away and that she had thrown the knife at her. Gray found his knife, and Cannaday asked for it. Gray gave Cannaday the knife and left her in the woods as he walked back to the van. At the van, Gray smoked a Kool cigarette. A Kool cigarette butt was later found several feet from a place where the van was thought to have been. It was Gray's belief that when he left Wojcik in the woods, Wojcik was still alive. When Cannaday returned to the van, she did not have the knife. She said that nothing happened, and they left.

To the contrary, however, it was Cannaday's version that she never went into the woods, but stayed at the van with Sowash and Bushart the entire time. Also, it was Bushart who threw the knife at Sowash as Sowash was escaping. Cannaday testified that Gray had blood on his clothes and on the knife upon return to the van. She thought that he had killed Wojcik. Gray became upset when he discovered that Sowash had gotten away. The three left in the van and went to Slidell, Louisiana with Cannaday driving.

While traveling, Gray discarded his bloody tee-shirt. Upon arrival at a store near Slidell, Cannaday bought a black tee-shirt which she put over her red/pink jumpsuit.

Cannaday and Gray went to the residence of Mrs. Mildred Page Robinson and her son Timothy Page, acquaintances of Cannaday when Cannaday and her ex-husband lived in a nearby

trailer park. Page noticed Cannaday with the black tee-shirt pulled over the jumpsuit. He did not notice any blood on Cannaday. Cannaday told him they had come to "party," and asked for some cut-off jeans to wear.

Cannaday removed her red/pink jumpsuit and placed it in water to soak. Cannaday's explanation for this was that she had started her menstrual period, and as a result the outfit needed to be soaked. Page did notice blood stains on one of Gray's arms and one of his pants leg. Gray was not wearing a shirt.

After talking with Mrs. Robinson for a few moments, Cannaday went to sleep. She did not bath or clean up before going to sleep other than wash her red/pink outfit. Gray and Page got into the van and left in search of a keg of beer.

Returning to the scene of the crime, when Sandra Sowash was able to escape, she found a nearby house from which she notified Harrison County Sheriff's Department.

At sunrise the body of Wojcik was found with nineteen stab wounds in the face, neck, chest and back areas, laying in a bushy wooded area some fifty feet from the road. However, the butcher knife was never found.

A detailed description of the white van was given by Sowash, as well as the name of Tina Cannaday, as a participant. Wojcik's wallet was found on the highway near Slidell, and the sheriff's deputies were aware that Cannaday once lived in Slidell, Louisiana. They notified the Louisiana authorities to be on the lookout for the white van and occupants.

In Louisiana the white van was spotted. Gray and Timmy Page were arrested.

Information obtained from Page and other information led the police to Mrs. Robinson's home where Cannaday was asleep. She was awakened, arrested and warned of her constitutional

rights. Investigators Al Herman of the St. Tammany Sheriff's Department, seized the outfit that Cannaday had put in the sink. The water had already drained out, and Herman noticed no blood on the clothing. Articles of jewelry later identified as belonging to Sowash and Wojcik were also recovered.

Cannaday was placed in a sheriff's car for transportation to the St. Tammany Sheriff's Department. At that point in time, she had been twice warned of her Miranda rights. During the car ride, Cannaday made unsolicited statements that Gray had used the knife to kill Wojcik and that she saw Gray grasp Wojcik's hair, pull his head back and cut his throat.

After arriving at the police station, Cannaday was criminally charged. In the presence of Harrison County Officers Martin and Johnson, she gave a fourteen page statement concerning her involvement in the crime, which story she also reflected at trial. Upon waiver of extradition, Cannaday and Gray were returned to Mississippi. After hitchhiking back from Louisiana, Bushart was arrested while walking along Highway 90 in Harrison County.

After incarceration, Cannaday stated to Officer Warden that she believed she was pregnant and that Wojcik was the father. She stated she had not had a menstrual period for three months.

Officer Jim Wren confirmed that a pregnancy test was given to Ms. Cannaday which was negative. Cannaday explained that the officers misunderstood her statements concerning her periods. She stated that she had missed two periods prior to June 3rd, but on the day of her arrest her menstrual period had started.

Blood tests made by Larry Turner of the Mississippi State Crime Lab indicated that both Wojcik and Gray had type

B blood. Blood spots found on Gray's pants were type B blood. Turner also tested the red/pink jumpsuit, which was worn by Cannaday. Those tests revealed the enzyme paradoxin in six areas which indicated possible blood traces. The stains, however, were insufficient to get a blood type. There were no traces in the crotch area of the clothing. Turner said that the finding of small traces was consistent with the garment having been washed.

Cannaday, Gray and Bushart were indicted for capital murder for the kidnapping and homicide of Wojcik, but tried separately. David Gray's trial preceded Cannaday's; after his conviction, Gray testified against Cannaday and maintained his position of innocence of any murder. Bushart claimed the constitutional privilege against self-incrimination and did not testify in either of the trials. She later pled guilty to manslaughter. Attina Marie Cannaday was found guilty of capital murder and sentenced to death.

II A.

GUILT/INNOCENCE PHASE

The first assigned error addresses exclusion of prospective jurors in violation of the principles set forth in Witherspoon v. Illinois, 391 U.S. 510, 88 S.Ct. 1770, 20 L.Ed.2d 776 (1968). (Exclusion of juror where unmistakably clear that the juror would automatically vote against death penalty without regard to any evidence developed at trial.)

Two jurors were excused in the case sub judice for their belief concerning imposition of the death penalty on a sixteen year old. However, no contemporaneous objections was was made when these two witnesses were excused.

Since no objection was made, this issue is not properly preserved for review before this Court. Ratliff v. State, 313 So.2d 386 (Miss. 1975); Pittman v. State, 297 So.2d 888 (Miss. 1974); Meyers v. State, 268 So.2d 353 (Miss. 1972).

However, even if the issue was properly preserved for appeal, the assignment would be without merit.

Both prospective jurors answered that they would not be able to vote for the death penalty regardless of what the evidence showed because of the youthful age of Cannaday. If prospective jurors could not follow the law and the evidence and render a death penalty where warranted, they would not have been a fair juror to the state. Evans v. State, 422 So.2d 737 (Miss. 1982); Irving v. State, 316 So.2d 1360 (Miss. 1978); Witherspoon v. Illinois, supra. Attempts by counsel to rehabilitate the testimony of the prospective jurors was not successful, and they were properly excused by the trial court. Therefore, even if the action of the trial judge was objected to at trial and that objection properly preserved for appellate review, the assignment would be meritless.

B.

Did the trial court err in restricting cross-examination as to the probationary status of the state's primary witness, David Gray?

During David Gray's cross-examination by the defense, Gray was asked about his three prior convictions. Thereafter, defense counsel attempted to ask Gray about his probationary status as follows:

> Q. You were on probation at the time you were arrested.
>
> BY MR. NECAISE: Object to that, If The Court Please. He can't go into that.
>
> BY THE COURT: Sustained.

Defense counsel relies upon the Sixth Amendment, United States Constitution's guarantee of the right to confront witnesses and Davis v. Alaska, 415 U.S. 308, 94 S.Ct. 1105, 39 L.Ed.2d 347 (1974) for support of this assignment. Mississippi Constitution, Article 3, Section 26, is the basis

in Mississippi's jurisprudence for the assertion of this constitutional right to confront witnesses in criminal prosecutions."

Cannaday's argument is that the Sixth Amendment right to confrontation of witnesses requires that a defendant in a criminal case be allowed to impeach the credibility of a prosecution witness by cross-examination directed at possible bias derived from the witness's probationary status.

The Davis case, supra, upon which defense relies involved the testimony of a juvenile who was on probation. Defense counsel argued that the probationary status was proper evidence to attack a witness's credibility as revealing biases, prejudices, or ulterior motives. The United States Supreme Court said:

> We have recognzied that the exposure of a witness' motivation in testifying is a proper and important function of the constitutionally protected right of cross-examination.
> (415 U.S. at 317).

We acknowledge this principle as constitutionally guaranteed. Factually, however, Davis v. Alaska is distinguishable from the case sub judice. Here, it was known to the jury that Gray was previously sentenced to death for his involvement in this crime. He was not on probation, but in jail. After receiving the ultimate death sentence, Gray's previous probationary status from other crimes would not be relevant in Cannaday's trial. In the Davis case the juvenile was not incarcerated, but was on probation. Therefore, the case sub judice is distinguishable from the Davis v. Alaska both in the facts and reasoning.

The case law of this state holds that a witness can be impeached by showing a prior conviction. Anything less than a final judgment conclusively establishing guilt cannot be used. Murphree v. Hudnall, 278 So.2d 427 (Miss. 1973).

Examination of the prior convictions was permitted by the trial judge.

The Sixth Amendment right to confrontation was satisfied in the case sub judice since the defendant was adequately allowed "to expose to the jury the facts from which jurors as the sole trier of fact and credibility could appropriately draw inferences relating to the reliability of the witness."United States v. Balliviero, 705 F.2d 934, 938 (5th.Cir. 1983); Davis v. Alaska, 415 U.S. 308, 318, 39 L.Ed.2d 347, 355. We find no restriction on cross-examination that requires reversal in this assignment.

C.

Did the court err in prohibiting defense counsel from eliciting certain testimony from the two psychiatric experts called by the defendant?

Two experts, one a psychologist and the other a psychiatrist, were called by the defendant. Both of these experts had been appointed by the court to conduct mental examinations of the defendant and both testified that Ms. Cannaday knew right from wrong under the M'Naughten test. Edwards v. State, 441 So.2d 84 (Miss. 1983).

Ms. Cannaday's intelligence quotient was testified to be a borderline mental retardation level with a score of between 60 to 84, and a mental age of 9.8 years. To counter the state's case of her knowing participation in this crime, the defense sought to show Cannaday's limited mental ability through the expert psychiatric testimony.

Defense counsel posed two hypothetical questions to the clinical psychologist, both of which contained facts not in evidence. The first such question contained a reference to Cannaday's having "smoked marijuana," and the second question was conditioned on Cannaday's "crying" and being "upset." Neither fact was in evidence. The posing of a hypothetical

question based upon facts not in evidence was properly objected to, and the court's action in sustaining the objection was proper. Caddilac Corp. v. Moore, 320 So.2d 361 (Miss. 1975); Washington v. Greenville Mfg. and Machine Works, 223 So.2d 642 (Miss. 1969); Prewitt v. State, 106 Miss. 82, 63 So. 330 (1913).

Additionally, the defense counsel asked of the expert:

> (1) Based upon (your) professional opinion was Cannaday capable of plotting the murder . . . and inducing a casual friend, David Gray, to commit the murder?
> (2) (Based upon the evidence) do you think she was able to understand the severity of the situation she was in?

In the recent case of Edwards v. State, 441 So.2d 84 (Miss. 1983), this Court discussed the insanity defense as applied in a capital murder case, where sanity was an issue. this Court continued to apply the M'Naughten rule as the test on this issue, i.e. whether the defendant knew right from wrong at the time the crime was committed. Sanity is not an issue in the case sub judice. It is undisputed that the defendant knew right from wrong. The defense was trying to assert a diminished capacity defense in this case, which is not a defense to a criminal charge in this state. Edwards, supra. Hill v. State, 339 So.2d 1382 (Miss. 1976), Laney v. State, 421 So.2d 1216 (Miss. 1982).

While the question as to whether Cannaday understood the severity of the situation she was in might be probative on the issue of knowingly waiving Miranda rights, it should have no relevance as to guilt or innocence under this state's present rules.

It is the opinion of this Court that no error was committed here.

D.

Was the trial court in error in permitting incriminating statements made by Cannaday in response to a question of a

deputy sheriff/jailer a violation of her constitutional rights to counsel under the Fifth and Sixth Amendments to the United States Constitution.

The two issues here are: (1) was Cannaday's constitutional right to counsel violated? (2) if so, does the violation require reversal of both her guilt and sentence trials?

Ronald Mason, deputy sheriff and jailor at the Harrison County Jail, became acquainted with Tina Cannaday after she was incarcerated. Counsel had been appointed for her. About three days after Cannaday had her preliminary hearing, Mason was within the jail with a trusty to remove garbage. Over defense objection, Mason testified:

> (W)hen I got to the door Tina Cannaday and Susan Warden were standing by the door laughing and joking, so I got to talking to them. I understood they were talking about murder, so I asked Tina, I said "Tina, did you kill him"? She did not say she killed him, she did not say that David Gray or anybody else killed him. But she did say "after the head was cut back, I took the head and shook it and tried to break it off", that she wanted to keep the head. Susan Warden was a witness to this.

However, Susan Warden related a somewhat different version of the statements. Warden testified that Cannaday responded to Officer Mason's question by saying that she did not kill Ronald Wojcik but that she should have taken his head off and brought it home. Warden stated that Cannaday did not say that she shook Wojcik's head and tried to take it off.

Cannaday, while on cross-examination during the sentencing phase of the trial, did not remember telling Officer Mason about Wojcik's head. Nor did Cannaday remember telling Susan Warden that she wanted Wojcik's head. But she admitted she probably did say it. She did state that she did not go out into the woods and shake Wojcik's head.

The error assigned on appeal is that this statement was

elicited from Ms. Cannaday in violation of her U. S. constitutional rights under the Fifth and Sixth Amendments. The state argues that the Fifth and Sixth Amendment right objection was not made at trial, and therefore, it is procedurally barred and not before this Court.

In reverse order, we address the state's contention on this assignment that the question is procedurally barred for failure of the defense to timely object based on the grounds of the Fifth and Sixth Amendments. Hill v. State, 432 So.2d 427 (Miss. 1983); Williamson v. State, 330 So.2d 272 (Miss. 1979); Stringer v. State, 279 So.2d 156 (Miss. 1973).

However, this Court is compelled to note that objection was repeatedly made by defense counsel although not based on the specific ground of the right to counsel.

The first objection made was that the statement was immaterial, prejudicial, inflammatory and improper rebuttal. The trial judge ruled that it was proper rebuttal since it was offered in proof of Cannaday's intent to kill Wojcik, which she denied. The second objection made to the statement was on the basis that the statement was hearsay. The third and the last objection was a renewal of the earlier objections. Further argument against this statement was made on the motion for a new trial, based upon hearsay grounds.

Although counsel was not as articulate in his first objection of "prejudicial" or "inflammatory" as he might have been, the objection was made, and the repeated objections cannot be ignored where fundamental constitutional rights are involved. Massiah v. United States, 377 U.S. 201, 84 S.Ct. 1199, 12 L.Ed. 246 (1964). The gravity of this statement is evidenced by the fact that on the motion for a new trial, Judge Griffin stated: "I think that part about the head is probably what brought the death sentence." In view of defense counsel's objection, we address this issue on its

merits in this capital murder case.

The constitutional basis for defendant's position is twofold. The United States Constitution, Amendment V, provides that "(N)o person shall be held to answer for a capital . . . crime, . . . nor shall be compelled in any criminal case to be a witness against himself, . . . without due process of law. . . ."

Secondly, defense relies upon the Sixth Amendment to the United States Constitution providing that "(I)n all criminal prosecutions, the accused shall enjoy the right to . . . have the assistance of counsel for his defense." The Sixth Amendment rights are applied to state prosecutions through the Fourteenth Amendment of the United States Constitution. Watson v. State, 196 So.2d 893 (1967), Powell v. Alabama, 287 U.S. 45, 33 S.Ct. 55, 77 L.Ed. 158 (1932).

Mississippi jurisprudence has the same constitutional, and statutory provisions, and rules guaranteeing these same rights. Mississippi Constitution Art. 3, Section 26 provides that "(I)n all criminal prosecutions the accused shall have a right to be heard by himself or counsel, or both, . . . and he shall not be compelled to give evidence against himself; . . ." Also, see Mississippi Code Annotated section 99-15-15 (1972) and Mississippi Criminal Rules of Procedure, Rule 1.03, 1.05.

Since the Mississippi jurisprudence provides an adequate and equal basis for these constitutional rights, we base our opinion herein on Mississippi law, notwithstanding the fact that reference is made to federal cases. The federal cases are used for the purpose of guidance, but Mississippi jurisprudence compels the result. Michigan v. Long, ___ U.S. ___, 103 S.Ct. 3469, 77 L.Ed.2d 1201 (1983).

Intertwined in this assignment are two federal constitutional amendments relating to the right to counsel which need to be distinguished.

The Fifth Amendment right addressed here is the privilege against self-incrimination. The Miranda v. Arizona, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966) decision is considered to be a Fifth Amendment decision although it interweaves both Fifth and Sixth Amendment rights. Included within the so-called Miranda rights is the right to assistance of counsel. Miranda, supra. Cannaday was afforded counsel; she was also repeatedly given her Miranda warnings prior to counsel appointment. These facts are undisputed.

However, the Sixth Amendment right to counsel has broader ramifications. The accused's right to counsel, once that right has attached, is a broad guarantee that the accused "need not stand alone against the state at any stage of the prosecution, formal or informal, in court or out, where counsel's absence might derogate from the accused's right to a fair trial." United States v. Wade, 388 U.S. 218, 226, 87 S.Ct. 1926, 1832, 18 L.Ed.2d 1149 (1967).

The time at which the right to counsel attaches to a defendant is when adversary proceedings have been initiated, whether by way of formal charge, preliminary hearing, indictment, information or arraignment. Kirby v. Illinois, 406 U.S. 682, 92 S.Ct. 1877, 32 L.Ed.2d 411 (1972).

In Mississippi, commencement of prosecution is governed by Mississippi Code Annotated section 99-1-7 (1972) where prosecution can be commenced "by the issuance of a warrant or by binding over or recognizing the offender to compel his appearance to answer the offense, as well as by indictment or affidavit." See also, State v. Hughes, 96 Miss. 581, 51 So. 464 (1910). Without dispute counsel was appointed in the case sub judice, and criminal proceedings had begun. The right to counsel had attached in Cannaday's case.

Once this right has attached in a criminal case interrogation may not commence without the express waiver by the defendant of the right to counsel. Massiah v. United States, 377 U.S. 201, 84 S.Ct. 1199, 12 L.Ed.2d 246 (1964). Nor may the police undertake interrogation in the absence of the attorney for the defendant if the attorney has expressly forbidden it. Brewer v. Williams, 430 U.S. 387, 97 S.Ct. 1232, 51 L.Ed.2d 424 (1977).

In discussing waiver the Supreme Court stated in Brewer, supra:

> (T)hat it was incumbent upon the State to prove "an intentional relinquishment or abandonment of a known right or privilege." Johnson v. Zerbst, 304 U.S. at 464. That standard has been reiterated in many cases. We have said that the right to counsel does not depend upon a request by the defendant, Carnley v. Cochran, 369 U.S. 506, 413: cf. Miranda v. Arizona, 384 U.S. at 471, and that courts indulge in every reasonable presumption against waiver, e.g., Brookhart v. Janis, supra, at 4; Glasser v. United States, 315 U.S. 60, 70. This strict standard applies equally to an alleged waiver of the right to counsel whether at trial or at a critical stage of pretrial proceedings. Schneckloth v. Bustamonte, 412 U.S. 218, 238-240; United States v. Wade, 338 U.S. at 237.

Again, in Edwards v. Arizona, 451 U.S. 477, 101 S.Ct.1880, 68 L.Ed.2d 378 (1981), the Supreme Court discussed waiver of the right to counsel, stating:

> It is reasonably clear under our cases that waivers of counsel must not only be voluntary, but must also constitute a knowing abandonment of a known right or privilege, a matter which depends in each case "upon the particular facts and circumstances surrounding that case, including the background, experience, and conduct of the accused." Johnson v. Zerbst, 304 U.S. 458, 464, 82 L.Ed. 1461, 58 S.Ct. 1019, 146 A.L.R. 357 (1938).

451 U.S. 482, 68 L.Ed.2d 385. In footnote 8 of the Edwards opinion the Court stated:

> In Brewer v. Williams, 430 U.S. 387, 51 L.Ed.2d 424, 97 S.Ct. 1232 (1977), where, as in Massiah v. United States, 377 U.S. 201, 12 L.Ed.2d 246, 84

> S.Ct. 1199 (1964), the Sixth Amendment right to counsel had accrued, the Court held that a valid waiver of counsel rights should not be inferred from the mere response by the accused to overt or more subtle forms of interrogation or other efforts to elicit incriminating information. In Massiah and Brewer, counsel had been engaged or appointed and the admissions in question were elicited in his absence.
> 451 U.S. 484, 68 L.Ed.2d 386.

The court noted, however, that a defendant may waive his rights to counsel[2], at least under the Fifth Amendment, where he initiates the meeting with the authorities and then gives statements. Such statements are admissible.

In the case sub judice, both Officer Mason and Susan Warden testified about a solicited statement that Cannaday made in response to a question asked by a person whom she knew was a sheriff's deputy (Mason).

The statement made to Officer Mason in response to his question was made at a time when the Sixth Amendment right to counsel had attached. Since the question was made without the benefit of the presence of her attorney, Cannaday's Sixth Amendment rights were violated.

We next address the violation to determine if the entire trial is vitiated.

Analyzing the response from Cannaday reveals that neither witness said she killed Wojcik. One statement placed her in the woods shaking the victim's head; one denied that she was shaking the head. The statement which placed her in the woods inferred that she killed Wojcik.

However, taking the testimony as a whole here, the Court holds that the evidence of Cannaday's guilt as a principal to the kidnap and murder is so overwhelming that the jury could have reached no other conclusion.

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[2] See Warden v. Stumes, No. 81-2149, Slip Op. (U.S. Supreme Court Feb. 29, 1984).

In United States v. Hasting, ___ U.S. ___, ___ S.Ct. ___, 76 L.Ed.2d 96 (1983), the United States Supreme Court has held that the violation of a Fifth Amendment guarantee was not error per se if "on the whole record, the error was harmless beyond a reasonable doubt."Citing Chapman v. California, 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967).

> All of these rules, state or federal, serve a very useful purpose insofar as they block setting aside convictions for small errors or defects that have little, if any, likelihood of having changed the result of the trial. We conclude that there may be some constitutional errors which in the setting of a particular case are so unimportant and insignificant that they may, consistent with the Federal Constitution, be deemed harmless, not requiring automatic reversal of the conviction. (386 U.S. 22, 17 L.Ed.2d 709)

This Court holds the Sixth Amendment right to counsel was violated, but declare that such error was harmless on the guilt phase in view of the overwhelming evidence presented against Ms. Cannaday. Schneble v. Florida, 405 U.S. 427, 92 S.Ct. 1056, 31 L.Ed.2d 340 (1972); United States v. Metcalf, 698 F.2d 877 (7th.Cir. 1983).

Turning to the sentence phase, however, we cannot so hold. Counsel objected to this statement for its prejudicial and inflammatory nature. The record reflects the trial judge's statement that the "head remark" brought the death penalty. We also conclude that this violation of the defendant's Sixth Amendment right to counsel so infected the sentence phase that reversal of that phase must be ordered.

This court reverses the sentence phase and remands for a new sentence phase trial.

E.

We answer the fifth assignment of error since we affirm the guilt phase.

Was it error to refuse to instruct the jury on the lesser included offense of kidnapping?

The following instruction was refused by the trial court at the conclusion of the guilt phase of the trial to which

defense took exception.

INSTRUCTION NO. 16

The Court instructs the Jury that if the Jury can deduce from the facts and circumstances surrounding the case, either from the evidence or lack of evidence, reasonable facts consistent with the Defendant's guilt of a lesser offense than Capital Murder, then there is a reasonable doubt of her being guilty of Capital Murder, and the jury should return the following verdict:

"We, the Jury, find the Defendant not guilty of Capital Murder, but we do find the Defendant guilty of Kidnapping," in which event it will be the duty of the Court to sentence the Defendant as provided by law.

A "lesser included offense" is defined as "one composed of some, but not all, of the elements of the greater crime, and which does not have any element not included in the greater offense." Black's Law Dictionary, p. 812 (5th.ed. 1979). State v. Stewart, 292 So.2d 677 (La. 1974).

The instruction of a lesser included offense where warranted by the evidence is warranted. Jackson v. State, 337 So.2d 1242 (Miss. 1976), Johnson v. State, 416 So.2d (Miss. 1982).

In Jones v. Thigpen, 555 F.Supp. 870 (S.D. Miss. 1983), the Federal court held that the instruction was properly refused since robbery was proven and any murder committed during the robberry was capital murder. In Jones v. State, 381 So.2d 983 (Miss. 1980), no evidence was presented that the defendant, Jones, was the one who struck the lethal blows to the victim, although blood was found on his boots.

Jones v. State, supra, is similar to the case sub judice. There is no direct evidence that Cannaday stabbed Wojcik. However, she admitted to the kidnapping. Any murder committed during that kidnapping would have been capital murder imputed to all three of the perpetrators. To be a lesser included offense, kidnapping would have to be a component of murder. Instead the charge of kidnapping is an underlying felony which elevates the murder charge to that of

capital murder. Murder and manslaughter may be lesser included offenses of capital murder, but kidnapping is not. In Re Jordan, 390 So.2d 584 (Miss. 1980). We find no error in this assignment requiring reversal of the guilt phase.

III.

All other assignments need not be addressed since a new sentence trial will be held, with the exception of assignment 7, that the imposition of the death penalty on a sixteen year old child at the time of the crime constitutes cruel and unusual punishment under the Eighth and Fourteenth Amendments.

Cannaday raises her age (sixteen at the time of the crime) as an issue on appeal asserting that the imposition of the death penalty on a sixteen year old would be cruel and unusual punishment under the Eighth and Fourteenth Amendments of the United States Constitution.

The United States Supreme Court granted certiorari on this issue. See Eddings v. Oklahoma, 450 U.S. 1040, 101 S.Ct. 1756, 68 L.Ed.2d 237 (1981). However, the high court reversed Eddings on an alternative ground and did not address the age issue. See Eddings v. Oklahoma, 455 U.S. 104, 122, 71 L.Ed.2d 1, 14 (1982).

In light of the Supreme Court's silence on this issue, the problem of when a juvenile can be punished the same as an adult remains with the Legislature. The law in Mississippi specifically Mississippi Code Annotated section 43-21-151 (1972) provides that: "No child who has not reached his thirteenth birthday shall be held criminally responsible or criminally prosecuted for a misdemeanor or a felony. . . ." Inferentially one who has reached his or her thirteenth birthday, may in certain cases be tried as an adult. Mississippi Code Annotated section 43-21-137 (1972). This

necessarily implies that the juvenile in these cases could be punished the same as an adult.

The capital murder statutes in this state include as age a mitigating factor to be considered. Mississippi Code Annotated section 99-19-101(6)(g) (1972) (1983 Supp.). See also, Tokman v. State, 433 So.2d 664 (Miss. 1983). In the case sub judice age was considered along with other mitigating circumstances supported by the evidence. With this in mind, the jury returned the sentence of death. Even though we grant Cannaday a new trial on the sentence phase, her age at the time of the crime remains a mitigating factor to be considered by the jury. Her age by itself is not grounds for reversal.

HEARING ON PETITION FOR WRIT OF ERROR CORAM NOBIS

Cannaday relies on Dunn v. Reed, 309 So.2d 516 (Miss. 1975), for the proposition that the Harrison County Circuit Court had jurisdiction to hear testimony and consider new evidence via petition for writ of error coram nobis after appeal had previously been perfected to this Court.

In Dunn v. Reed, supra, Chief Justice Gillespie interpreted Mississippi Code Annotated section 99-35-145(2) which provides:

> (2) In all cases wherein a judgment of conviction in a criminal prosecution has been affirmed on appeal by the supreme court, no petition for the writ of error coram nobis shall be allowed to be filed or entertained in the trial court unless and until the petition for the writ shall have first been presented to a quorum of the justices of the supreme court, convened for said purpose either in term time or in vacation, and an order granted allowing the filing of such petition in the trial court.

The Dunn case involved guilty pleas to manslaughter and arson. These pleas were entered in the Neshoba County Circuit Court. Subsequently, a petition for writ of error coram nobis was filed in that same court. The petition was dismissed without an evidentiary hearing on the grounds that

it was not brought in the proper court. This Court acknowledged that if the allegations in the petition were true, the issuance of the writ would be required.

Speaking for the majority, Justice Gillespie held that Mississippi Code Annotated section 99-34-145(2) did not apply where convictions had not been affirmed on appeal. This Court held that "The Neshoba County Circuit Court had exclusive jurisdiction to entertain the petition for a writ, and it was error to dismiss the petition without an evidentiary hearing." (Id. at 518).

Dunn is distinguishable from the case sub judice. Dunn involved guilty pleas, whereas Cannaday was convicted after a plea of not guilty. There would never have been a direct appeal to this Court in Dunn because of the guilty pleas. On this basis Dunn v. Reed is not applicable to the case sub judice.

This Court has held that before a petition for error coram nobis will lie, it is necessary that this Court consider the case on the merits. Johnson v. State, 416 So.2d 679 (Miss. 1982); Murphree v. State, 22 So.2d 694 (Miss. 1969). See also Harvey v. State, 251 Miss. 36, 168 So.2d 49 (1964); Petition of Lee Broom, 251 Miss. 25, 168 So.2d 44 (1964).

In Depreo v. State, 407 So.2d 102 (Miss. 1981) a bill of exceptions was filed in the circuit court after appeal had been perfected. Addressing the jurisdictional issue there this Court held:

> It is obvious that the filing of the instrument on June 26, 1979, was after the appeal had been perfected to this Court and therefore the lower court was entirely correct in holding that it had no jurisdiction to hear the instrument filed. Denton v. Maples, 394 So.2d 895 (Miss. 1981); Edmonds v. Delta Democrat Publishing Co., 221 Miss. 785, 75 So.2d 73 (1954).
>
> It is therefore appearent that the third and final assignment of error is without merit. In

> the event appellant has merit in the allegations in his instrument filed, after the appeal was perfected, he has adequate recourse to present those contentions at the proper time and place. (Id. at 109).

We hold that the trial judge was correct when he decided that Cannaday had lost her jurisdiction in the circuit court when appeal was perfected to this Court. It was not error to deny coram nobis relief.

GUILT PHASE, Affirmed. All Justices Concur.

SENTENCE PHASE, Reversed and Remanded For A New Trial. Patterson, C. J., Roy Noble Lee, P. J., Bowling, Hawkins, Dan Lee, Robertson and Sullivan, JJ., Concur. Walker, P. J., Dissents.

IN THE SUPREME COURT OF MISSISSIPPI

NO. 54,982

ATTINA MARIE CANNADAY

v.

STATE OF MISSISSIPPI

WALKER, PRESIDING JUSTICE, DISSENTING:

The majority has reversed the death sentence in this case because Attina Marie Cannaday did not have an attorney present when she remarked to a guard (in response to a question) "after the head was cut back, I took the head and shook it and tried to break it off."

I do not believe that a defendant who has been appointed an attorney or who has employed an attorney and presumably been advised of her constitutional rights under the Fifth[1] and Sixth[2] Amendments to the United States

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[1] "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any Criminal Case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation." U. S. CONST. amend V.

[2] "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining Witnesses in his favor, and to have the Assistance of Counsel for his defence." U.S. CONST. amend VI.

Constitution not to make any statements to authorities without her attorney present, is entitled to any further protection in this regard.

The Sixth Amendment does not require twenty-four hour a day presence of counsel. Nor do I believe that the Sixth Amendment prevents authorities from asking a question of a defendant so long as the defendant is willing to answer and does not then invoke the right not to answer except with her attorney present. I feel confident that the framers of the Constitution never intended that it would protect a defendant from her arrogant utterings, voluntarily made, with respect to the details of a crime committed by her.

In this case Cannaday was not coerced in any way nor promised any reward when she answered a casual question by the jail guard and admitted her participation in this heinous crime. It was not only a confession of her guilt but was evidence of her lack of remorse, callous feelings and depraved heart with respect to the crime which she planned and enticed others into helping her commit.

I would affirm the finding of the jury and the judgment of the circuit court.

END OF DOCKET